Comparative Study of Muslim Family Laws of Pakistan and Malaysia: A Shariah Perspective

by

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Submitted in partial fulfillment of the requirements for the degree of PhD in Islamic Studies

by

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CERTIFICATION FROM THE SUPERVISORS

This thesis entitled **"Comparative Study of Muslim Family Laws of Pakistan and Malaysia: A Shariah Perspective"** submitted by **Mr. Fazle Omer** to **Kohat University of Science and Technology, Kohat** for the award of degree of **PhD in Islamic Studies** presents bonafide research work carried out under our supervision. This work (in full or in part) has not been submitted to any other institution for award of any degree/diploma/certificate.

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CERTIFICATION FROM THE EXAMINERS

This thesis entitled "**Comparative Study of Muslim Family Laws of Pakistan and Malaysia: A Shariah Perspective"** presents a bonafide record of original research work carried out by **Mr. Fazle Omer** in partial fulfillment of the degree of **PhD in Islamic Studies**, Kohat University of Science & Technology, Kohat. We find the work satisfactory for the award of the degree if other requirements are met. The Viva Voce/ Public Defence was held on____/   /2015.

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Introduction

The term of *Shaksī* or *Aāilī qawanīn* (Personal or Family Laws) possess historical background which traces back to British Colonial rule in Indian subcontinent. As a fact, both are not Islamic Jurisprudential terminologies rather both are the translation or substitutes for the Personal and Family Laws, respectively. While studying the books of Islamic Jurisprudence, one can find the topics related with Family Laws in chapters of *Nikāh*, *Talāq*, *Hadhānah* and *Farāidh* etc.

During the British colonial rule, religious matters were separated from the main body of laws, declaring them as Personal Laws. Therefore, the laws related with marriage and divorce were discriminated from other laws being based on religion or any juristic school of thought. This perception resulted in raising two misunderstandings in the general public, firstly, *Shariah* (Islamic Law) is a kind of personal law and, secondly, marriage and divorce laws are *Shariah* based, therefore, they are beyond of any further legislation.

Principally, the law of any state is concerned with its geographical boundaries regardless of religion, caste, tribe or race. Hence, in the modern legal theory, the Islamic Family Law is purported as a complicated and unsolvable issue. In present age, if a person migrates form one country to another one, he is bound to comply with the laws of new country except his religious matters which do not change with the change of country. Thus, on international level, the Islamic Family Laws have been realized as an issue of international law and Human Rights.

On the other hand, the laws of marriage and divorce are not declared religious in every country of the world. It is also a fact that there are many sects and schools of thought in the Muslim world because of which Family Laws differ from country to

country and sect to sect. Therefore, legislation of family matters has turned into a complicated situation in the Muslim world.

The Colonists contracted the *Shariah* into personal matters, therefore, many other subject were accumulated into personal matters such as *Nikāh* (marriage), *Talāq* (divorce), *Farāidh* (Shares in inheritance), *wirāsat* (inheritance), *auqāf* (public trusts), *hadhānah* (custody) and *hebā* (gift) etc. These all subjects are described in detail in the books of Islamic Jurisprudence, therefore, they were not legislated during the colonial rule. Only those matters were brought into legislation which were in need of reform from colonial point of view. The legislation in Pakistan, after independence, also followed the same pattern.

The Muslim Family Laws Ordinance was promulgated in 1961 but it is not in enough detail rather it has provided some kind of reformative measures in some topics related with Family Laws. Generally, the Courts in Pakistan rely upon the opinions of various jurists over a specific issue. The present judicial system of Pakistan, follows the Doctrine of Precedence, it means; if a superior Court has adopted a specific opinion of any jurist, the lower Court is bound to follow it in the similar case. During the British rule, it was advised to British judges to follow rules of equity, justice and good conscience while adopting a specific opinion from other juristic opinions. The afore mentioned advice is closely related with the social norms and values of any nation. The social norms and values of British judges were different from habitants of Indian sub continent especially, their Muslim subjects. Therefore, in many cases of *Nikāh, Talāq, hebā* and *auqāf*, the British judges failed to understand the Islamic norms and values.

It is a fact that instructions about family matters are discussed in Qur'an in detail, which is the foremost source of Islam, as compared to other aspects of life and actions of submissions. Then, the Holy Prophet (SAW) implemented these instructions in the practical life and solved family related issues in the light of such instructions. Afterwards, the Muslim jurists took the responsibility of guiding the Muslim *ummah* and provided solution for a number of possible future issues based on the *Fiqh Al.Mafrūḍ* [the Supposed Jurisprudence]. However, it is an undeniable fact that time changes with a rapid pace continuously resulting in the formation of new issues and situations.

Generally, on international level and, especially, on national level, the Muslim Family Laws are facing new challenges. The present technological development has contracted the whole world into a village and chances of utilizing the good experiences of others are doubled, therefore, under such incitement, the research entitled as " Comparative Study of Muslim Family Laws of Pakistan and Malaysia: A Shariah Perspective" has been undertaken.

Problem Statement

In 1961, General Ayub Khan, the then President of Pakistan, issued an Ordinance namely " Muslim Family Laws Ordinance" in order to bring Muslim Family Laws in line with contemporary demands of the day. Some clauses of the said ordinance are criticized from the beginning and remained controversial. Literature in agreement and disagreement of these Laws has been emerged. Some clauses of the Ordinance remained divisive among national Muslim scholars, hence, those who wrote in disagreement include *Mufti Muhammad Shafi* (d. 1976 AD), *Ihtesham ul Haq Thanvi* (d. 1980 AD), *Mufti Wali Hassan Tonki* (d. 1995 AD) *Molana Amin Ahsan Islahi* (d. 1997 AD) and *Mufti Muhammad Taqi Usmani*. Similary, some wrote in favour of these Laws such as *Ghulam Ahmad Pervez* (d. 1985 AD), *Mohi ud Din Ansari* and *Dr. Kamal Farooqi*. Practically, the Muslim Family Laws Ordinance

are eyesore for the Pakistani Ulema and they term these Laws against the injunctions of Qur'an, Sunnah and Jurisprudential assets of the past.

On the other hand, the parliament of sister Asian Muslim country Malaysia, has legislated the Family Laws and an act namely Muslim Family Law Act 303 has been enacted in the country. This act was promulgated in 1984 and it is supported by public representatives of the parliament.

In such scenario, the comparative study of Muslim Family Laws of Malaysia, which are based on the *Shafi* school of thought can benefit in the Islamization and reform of Muslim Family Laws of Pakistan.

Objectives of Research

The objectives of this research are as under:

1. Bringing forth the solution of possible deficiencies in the Muslim Family Laws of Pakistan
2. Benefitting from Malaysia in process of Islamization in the country
3. Making the Muslim Family Laws of Pakistan more comfortable and convenient for society through bringing them at par with spirit of Qur'anic Family Instructions and Sunnah of the Prophet (SAW)
4. Ending the insistence over a single juristic school and taking advantage from other juristic schools for public interest

Research Methodology

1. As this research is of historical nature, therefore, data collected through visiting various libraries.

2. Muslim Family Laws Ordinance 1961 of Pakistan and Muslim Family Laws of Malaysia Act 303 were kept before for reviewing them comparatively in the perspective of Qur'an and Sunnah.

3. Keeping in view the moderate mode of Qur'an and *Sunnah*, public interest was preferred than restriction of following a specific school of thought.

4. Concerned Legal experts and lawyers were consulted.

5. For better comprehension and insight of the research problem, researcher visited Malaysia two times and professors of Malaysian Universities were consulted (especially professors from International Islamic University and University of Malaya, Kualalumpur).

6. Researcher held meetings with the officials of JAKIM and Ministry of Women Development, Malaysia.

7. *Muhammadi Qura'nic* Font has been used for the Arabic text of *Qura'nic* verses and English Translation of *Mufti Muhammad Taqi Usmani* has been selected for the translation of verses.

8. APA style has been used for the composing of the research thesis.

Plan of work

Topic of Research: Comparative Study of Muslim Family Laws of Pakistan and Malaysia: A Shariah Perspective

Introduction: Reasons for selecting this topic

Chapter 1 Fundamental Discussions

1.1 Introduction of Muslim family laws of Pakistan

1.2 Review of the reservations over Muslim family laws of Pakistan

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Chapter 2: Registration of Marriage

2.1 Process of registration of Marriages in Pakistan, Rules and punishment in case of contravention

2.2 Process of registration of Marriage, rules and punishments in case of contravention.

Chapter 3: Review of Laws Regarding the Dissolution of Marriages

3.1 Procedure of Talaq ad comparative study of the laws of both countries

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5.1 Meaning of *Hadānah* and its kinds

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The researcher has tried his best to present this piece of research work in a perfect way but to err is human, therefore, the researcher requests pardon for any unintentional mistake. However, it is a fact this research which is based on the comparative study of Family Laws of two Muslim countries would serve as foundation stone for the solution of contemporary issues.

The researcher prays to Almighty Allah for honoring this humble effort.

Fazle Omer Date: Feb 25, 2014

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List of Abbreviations

S.No	Abbreviation	Definition
1	A.I.R	All India Reporter
2	A.P.W.A	All Pakistan Women Association
3	C.L.C	Civil Law Cases
4	F.I.R	First Information Report
5	F.M.S	Federated Malay States
6	I.K.I.M.	The Institute of Islamic Understanding Malaysia
7	J.A.K.I.M.	Department of Islamic Development Malaysia
8	J.A.W.I.	Federal Territory Islamic Religious Department
9	J.K.S.M.	Syairah Judiciary Department Malaysia
10	J.H.	Jurnal Hukum *(A Malaysian Legal Journal)*
11	M.A.I.W.P.	Federal Territory Islamic Religious Council
12	M.F.L.O	Muslim Family Laws Ordinance
13	M.K.I	National Council for Islamic Affairs
14	M.L.D	Monthly Law Reporter
15	N.L.R	National Law Reporter
16	N.W.F.P.	North West Frontier Province
17	P.L.D	Pakistan Law Decisions
18	P.Cr.L.J	Pakistan Criminal Law Journal
19	R.A.	Radiallaho Anho
20	S.A.W	Sallaho Alaihe Wassalam
21	S.C.M.R	Supreme Court Monthly Review
22	U.M.S.	Un-Federated Malay States
23	Y.L.R.	Yearly Law Reporter

Abstract

The topic of the current research is the comparative study of Family Laws of two Muslims countries (Pakistan and Malaysia) in the light of *Shariah*. Both countries lived under the influence of British colonial rule for centuries and inspired from the effects of changes in cultural, educational and legal spheres of life. After getting independence from British, both have struggled to Islamize the area of Family Laws. The majority of Muslim population of Pakistan follow *Hanafi* school of thought, on the other hand, Muslims of Malaysia follow *Shafi* school. This difference of schools of thought resulted in variance of some aspects of Family Law. Similarly, the Muslim world is divided into many religious sects based on various schools of thought. This research aims to make Muslim Family Laws of Pakistan more better regarding the rights of women in the perspective of *Shariah*.

Pakistan's Muslim Family Laws are not complied in a book rather they are scattered in Acts, Ordinances and Legal Decisions. While, the Family Laws of Malaysia are complied in the shape of a book after passing from the parliament as Act. Pakistan's Family Laws are criticized by orthodox and modernists. Major observations which are made about these laws include being cruel, unfriendly, against women's interests and anti Shariah. On the other side, Malaysia's Family Laws are less criticized and they are acceptable to the public, both orthodox and modernists.

Comparative study of the Muslim Family Laws of both countries reveals that there are ample chances of modifying and improving the Muslim Family Laws of Pakistan in order to make them comprehensive, comfortable and friendly for women.

Chapter 1

Fundamental Discussions

1.1 **Introduction of Muslim Family Laws of Pakistan**

Before going to discuss the family laws[1] of Pakistan, it seems appropriate to look at historical background of these family laws. There were two types of Family Laws in the Indian sub-continent before its partition in 1947. Firstly, there were such kind of Family Laws which were applicable on each member of society apart from his or her religion and caste, e.g. Guardians and Wards Act 1890 [2] and Child Marriage Restraint Act 1929.[3] Secondly, the Family Laws which were concerned with a specific creed or religion and, in this regard, separate Family Laws of Parsis, Hindus, Christians and Muslims were in practice.

The laws which were concerned with the Muslims included N-W.F.P Muslim Personal Law Act 1935[4], Muslim Personal Application Act 1937[5] and Dissolution of Muslim Marriages Act 1939.[6]

Besides these written laws, the unwritten customary laws[7] were also followed in respective regions and they used to be in practice parallel to the Muslim Family Laws.

It is a fact that Indian sub-continent had a diversity in races, languages, cultures, races, tribes, customs and religions etc. which had been developed in the result of the centuries long evolution and growth of many civilizations in this region particularly. Therefore, any specific customary law was not followed unanimously at any locality rather each tribe or clan had its own customs. Geographical, racial, tribal, religious and

lingual differences had affected these customary laws, to the large extent. Many groups from around the sub-continent had been migrated to it and settled here. Indian sub-continent had been invaded by a number of invaders.[8] Most of them brought new customs, rituals and cultures with them which replaced the former ones. As a result, new trends used to add to the lives of the people and new customary laws used to formulate and enjoin in the lives of public. Under these customary laws, many cases used to be settled by local resolving committees before reaching to the courts of law. Other factors of the popularity of these customary laws were the financial problems and pains of travelling to reach the courts of law due to insufficient ways of communication. For example, cases of honor crimes, murder, family matters and cases related with partition of land were brought to these local committees. Therefore, it will be of great importance to know the historical background of the evolution of the law generally and family law, specially.

1.1.1 Historical Background

Pakistan and India lie in a large area of ground which is called sub-continent [i.e. a smaller continent as compared to a normal continent]. The nomenclature of this region is described as it is almost cut off from the of the rest of Asia as there are three high mountain ranges in the north namely, the *Hindu Kush*, the *Karakurums*, and the *Himalayas*. Similarly to the north west, mountain ranges of *Sulaiman Kirthar* are situated while south is bounded by Arabian sea as well as the Bay of Bengal. The whole region covers 360,000 square miles area which is larger than Europe excluding Russia.

The region of sub-continent has an ancient history which dates back to 4000 years B.C when Dravidians [a group of the aboriginal races of India, pushed south by the Indo-Europeans and now mixed with them] and Aryans [Aryan is derived from Sanskrit word which stands for noble, in usage of human races it means the light skinned race of Indo-Europeans of western Europe] developed their civilizations. The Aryan entered into this region through western passes and settled in the northern areas of this region and pushed the earlier residents towards south. Aryans knew art of building, weaving, cultivation, rearing and war. They used to worship natural elements such as the sun, the moon, the thunder and rain, the earth and the rivers (Sheikh, 2012).

The most earliest deity among these gods in which Aryans used to believe was "*Indra*" who was considered as king of gods having god ship of war, rain and sacker of cities. Gradually, three other gods were emerged in the form of triangular having names of Brahma; the creator, Vishnu; the preserver and Siva; the destroyer. The next prominent change in this civilization was the institution of four castes in the society. According to this system, Brahmins occupied the top most position in the society being the religious leaders and priests. Second position was clinched by *Kashatriyas* who were commanders, leaders and kings. Third class was specified as *Vaisya* caste who were artists, artisans, farmers, traders and minor officials. The most lowest class belonged to *Sudras*, who were left for menial services. This caste system and division was fixed and inherited and it was impossible for a lower class man to be promoted to a higher class, no matter how talented he might be (Mahmud, 1988).

This region had seen the culmination and collapse of many civilizations. Following the legacy of change and revolution in world, Muslim traders established their

trade links with the West Indian coastal area of Malabar in the offing of 7th century CE. *Sultan Mahmood Ghaznavi* (971-1030 AD) attacked Lahore in the 10th century CE and *Sultan Muhammad Ghauri* (1150-1206 AD) attacked Delhi in the 12thcentury CE, which laid foundation of the Muslim rule in the Indian sub-continent (Sheikh, 2012).

Muslim rulers of Indian sub-continent took special care of justice being a bright emblem of Islam. Specifically, during the Mughal's rule, an effective program of delivery of justice to the masses was commenced. The role of *Qāzī* was of much importance in that program as every provincial capital, town and large village had its own grade wise *Qāzī*, respectively. *Qāzīs* were further assisted by *muftis* (religious scholars having authoring of issuing rulings). The head of the judicial system was the supreme *Qāzī* of the empire, known as *Qāzī al Quzat.* The Emperors as head of sultanate were the overall chiefs of judicial system, who used to listen to the grievances of the masses, themselves (Saqib, 1997). During this period, non-Muslims were not forced to follow Islamic law in personal matters of civil nature, however, the criminal law was Islamic in nature. whenever, a conflict was found between the law of non-Muslims and Islamic law, the latter got preference.

Europeans started expeditions for discovering new horizons for revenue generation and expanding their kingdoms in the end of fifteenth century C.E. The first European who reached India and landed at the port of Calicut in 1498, was a Portuguese, Vasco da Gama (1460-1524 C.E). Portuguese were followed by Dutch, French and British who arrived into India in the search of material benefits. Their arrival, especially of British, proved to be of vital importance in the history of India as other foreign nations had to leave the Indian sub-continent, gradually. The British entered the Indian sub-

continent as businessmen and traders under the patronage of their organization, East India Company [9] (Emon, December 2006). The East India Company built its first factory at Surat [a city in the Indian state of Gujrat] with the approval of Mughal emperor *Nuruddin Jehangir* [August 30, 1569-October 28, 1627 AD] in 1612. Factory at Surat was followed by another factory at Madras in 1639, at Bombay in1668, and at Calcutta in 1690. Up to 1647, the total number of the factories under the control of the Company reached to the 23 and each factory remained under the command of a master merchant or governor.

For the purpose of protection, the Company constructed great walls around the factories which gave a look of castle type buildings to them. Notables among them are Fort William in Bengal, Fort Saint George in Madras and the Bombay Castle. The flexible policies of Mughal emperors and their officials resulted in the creation of two anti empire elements; Hindu and English. Their combination played key role in weakening the writ of Mughal government. English traders used to enjoy more trading rebates and facilities than local and other foreign traders, this practice incited enmity between them at one hand, and at the other, English traders received large scale contributions in their riches and wealth, making their political foot hold strong as well as influential in the Indian sub-continent (Rahim, 2006).

The East India Company achieved the rank of a confirmed political force in the region in 1765 when it got responsibility of collection of *Diwānī* [revenue] and *Nizāmat* [police and Justice] in Bengal. The Company appointed Indian officers for the execution of the assigned jobs but these officers could not be detached without the approval of the Company. Thus, although the job of managing - *Diwānī* as well as *Nizāmat* - was implemented through Indians, the Company attained genuine authority (Treaty of

Allahabad). In these days, influence of Islamic law was pure and simple as basic task of the Company was the collection of the revenue while administration of justice, criminal or civil, remained under the authority of Muslim emperors. The judicial officers were mostly Muslims. In criminal cases , Islamic law was followed while in civil cases, Hindu community had the facility to get decide the case as per Hindu law. For this purpose religious officers from Muslim and Hindu communities used to be appointed in the courts for assistance.

The Company maintained the structure of the Mughal judicial system in the earlier, but later on, substituted it according to the ideas of British administrators. A Supreme Court was established under the regulating act of 1773, which was the highest court of all. Warren Hastings [Dec 6, 1732-Aug 22, 1818] established a supreme civil court and a supreme criminal court at Calcutta, which were called *Sadr Diwānī Adalat* and *Sadr Nizāmat Adalat*, respectively. The former was presided over by the governor-general of the council[10] and the latter was placed under locally appointed judges.

Lord Cornwallis [1738-1805] reorganized the judicial system by establishing four Provincial Courts at Calcutta, Murshidabad, Dacca, and Patna. The local *Diwānī* courts were renamed as district or *zillah* courts, which were already working on civil cases. The two systems of *diwānī* [civil] *adalat* and *faujdari* [criminal] were linked at the district level by giving both civil and criminal power to the same judge. The *Munsif* court was at the lowest level of civil courts. The magistrates were authorized to try minor criminal cases. There was also a provision for appeal to higher courts against the decisions given by lower courts. Apparently, this system looked an ideal one but it proved a great

handicap in administration of justice. It created a class of legal middle-men or pleaders to advise confused complainants. The complicacy of the whole of legal machinery made it difficult to for a large number of masses to get relief from courts (Rahim, 2006, pp. 115-116).

The policy of East India Company in administering justice to Indian people was based on three main considerations:

a. Refraining any break with the past of the people

b. Maintaining better law and order situation for smooth trading/business for ensuring good profit

c. Abstaining intrusion with religious susceptibilities (Morely, 1858).

Therefore, the Company did not interfere in the personal laws of the various communities and customary laws were allowed to be followed in these areas. Lord Warren Hastings, after assuming the office of governor-general in 1772 AD, proposed a plan for administration of justice which was adopted by the Company in the provinces under its control. Under this plan, one religious officer each from Muslim and Hindu communities used appointed in courts for elucidation and assistance in administration of justice.

Later on, under the section 27 of the regulation of 1780 AD, it was decided " in all suits regarding inheritance, marriage, and caste and other religious usages or institutions the laws or *Qura'n* with respect to the Muhammadans and those of the *Shaster* [11] with respect to the *Gentoos* [Hindus] shall be invariably adhered to" (Morely, 1858, pp. 177-

8). If only one of the parties were a Hindu or a Muslim, the laws and usages of the defendant were to be applied (Rankin, 1946).

After the adoption of Lord Hastings's plan for administration of justice, the prime obstacle was the scarcity of competent English officers who posses serviceable indigenous legal and language knowledge. Lord Hastings believed that British must interfere in the local judicial system for its improvement on western style. As per his plan, new hierarchies of courts, both in civil and criminal areas, were established. The next significant job was the translation of such Islamic as well as Hindu collection of rules which can apply to all persons professing their adherence to Islam and Hinduism, respectively. Based on the urgency of the matter, Sir William Jones [Sep 28, 1746- Apr 27, 1794], a philologist, proposed to Lord Hastings, governor-general of Bengal, to compile translations of Muslim and Hindu laws to make these laws accessible to those Europeans who had to administer it (Hussain, 1935).

Consequently, the admired and reliable anthology of Islamic Jurisprudence according to *Hanafi* school of thought, *Al-Hidaya* by *Allama Burhan ud Din Ali bin Abi Bakr Al-Margheenani* [d.593H] was chosen and task of translation was assigned to Mr. Charles Hamilton [d. 1792], but dilemma was that Hamilton did not know Arabic language rather he had proficiency in Persian. Therefore, three Muslim religious scholars were deputed to translate the Arabic text into Persian, hence English translation was accomplished in 1791 AD but it lacked whole portion of inheritance which was considered one of the most important areas regarding Muslims. Therefore, realizing the urgency the need of the area concerned, Sir William Jones [Died: April 27, 1794] translated a specific book himself on the subject of inheritance called *Al-Sirajyi* compiled

by *Syed Sharif Al-Jorjani* [d.1413 AD] directly from Arabic to English (Hussain, 1935, pp. 30-31).

Another addition to these compilations of translations was the work of the Mr. Neil Baillie [1799-1883] in which he translated the famous *Fatawa Alamagiri* and a specific portion from the jurisprudential book of *Shia* school, *Sharaya ul Islam* by *Sheikh Najmuddin Abu Alqasim Jaffar bin Moayyid Al-Hilali* [d. 676 H], dealing with forensic law. It was named as "A Digest of Muhammadan Law". Thus, a set of three translations came into existence; detail of which is as follows:

i. Translation of *Hidaya* by Charles Hamilton [d. 1792 AD]

ii. Translation of *Sirajyi* by Sir William Jones [d. 1794 AD]

iii. Translation of *Fatawa Alamagiri* and *Sharaya ul Islam* by Neil Baillie [d. 1883 AD]

This set had been given title of Anglo-Muhammadan Law. This combination of translations had many short comings and errors which had been recorded by the honorable courts in their commentaries, partially.[12] Amazingly, no solid step had been taken by the British for reform or correction in these translations during their rule and these were treated as authoritative codes, professing Islam as a fixed body of rigid rules outside the dominion of interpretation and judicial prudence (Anderson, 1993).

The administration of Muslim law by a non-Muslim colonial power transformed ground for resistance in Muslim subjects of British rulers. Abolition of *Qāzī* courts, removal of religious officers from courts and dependence of English judicial officers on

limited translated text of Islamic Jurisprudence brought miseries for Indian Muslims, resultantly. Up to 1872 AD, the British crown put an end to every kind of Islamic laws. Moreover, abolition of *Qāzī* courts was adding difficulties to Muslims, therefore, in 1882 AD, National Muhammadan Association[13] demanded of the British government to reinstate *Qāzī* court system as its absence had effected the Muslims personal law's domain very badly and it was causing delaying of justice or even denying in some cases (Ghosh, 2007). In the late nineteenth century, political platform attracted the deprived public to raised voice for their identity in opposition to colonial rule. In this process a specific version of Islamic law came to be juxtaposed with colonial attacks upon it.

The first evidence occurred in the law of *waqf* [charitable endowment]. Prior to colonial rule, the term "*waqf*" seems to have applied to a wide variety of royal and personal grant-granting arrangements operated among both Hindu and Muslim groups in south Asia. Mosques, *sufi* shrines and other religious institutions received earnings from the land grants of the regal dignity as well as local gentry as well as wealthy merchants. At the same time, a variety of legal techniques were used by Muslims in Indian sub-continent and elsewhere to transmit property from one generation to the next while protecting while protecting it from political appropriation (Kozlowski, 1985). However, under British administration the tools of Anglo-Muhammadan scholarship were used to craft a single, *Shariah* based law *waqf* used primarily for settling estates.

In the last century of British rule, number of cases over *waqf* properties increased in colonial courts. This situation led up to the celebrated case of *Abdul Fata vs. Russomoy*, in which the Privy council affirmed the High Court of Bengal ruling that the

waqf in question was not of the nature of a valid charitable endowment, but simply served to enlarge the family (Abul Fata Vs Russomoy, 1894). The decision was indicative of broader colonial attack on *waqf* as a hindrance to economic growth in a market economy, moreover, this verdict served as rallying point for dissatisfaction of Indian Muslims. Resultantly, Muhammad Ali Jinnah [Dec 25, 1876-Sep 11, 1948] found his first major political victory in pressing the demand for the enactment of the Musalman Wakf Validating Act of 1913, which was supposed to overturn the verdict of Privy Council. It was an amazing fact that jurisprudential differences in opinions found in every school of thought generally and in *waqf* especially, instead of this legacy in *Hanafi* school, British tried daydreaming by compacting the wide spread rules of *waqf* in Anglo-Muhammadan law, as they used to believe (Anderson, 1993, p. 23) . The zenith of the scripturalist influence on law came with the Muslim Personal Law (*Shariat*) Application Act 1937. The act initiated originally on efforts of the Muslim scholars who lobbied successfully against the customs considered non-Islamic. This act affirmed the identity of Muslims on political arena of Indian sub-continent and a certain form of *Shariah*, too. It was an act of native initiation, but its appearance and objective reproduced a vision of the *Shariah* that had been redesigned in the British administration of Anglo-Muhammadan law.

The political awareness in public had been increased, gradually and they were demanding freedom from the colonial powers to shape their according to their own doctrines, especially the Muslims, who were struggling for a piece of land for fashioning their lives according to Islamic teachings. On the midnight of 14th August, 1947, Colonist had freed the Indian sub-continent and divided it into two countries namely Pakistan and India.

1.1.2 Legislation after the Independence

Pakistan emerged as independent country on August 14, 1947. As it was a newly born state, hence it had to initiate most of its businesses from the beginning. Due to a series of problems, it was decided that elected Muslim representatives during the general elections of 1946 from those constituencies which became part of Pakistan now, would be the members of constituent assembly of Pakistan. This assembly had dual role to play i.e. constitution development for the new state and legislation under the Indian independence act 1947.[14] Quaid-e-Azam Muhammad Ali Jinnah was selected as the president of the constituent assembly and Molvi Tameez ud Din Khan [1889-1963] was chosen as the first speaker of the legislative assembly. The Quaid-e-Azam used to preside the session of the assembly, when it held for constitution development and Molvi Tameez ud Din Khan used to act as speaker when it held session for legislation.

The Quaid's demise, just after one year of the creation of Pakistan, added miseries and difficulties in the newly born state and a number of controversies aroused.[15] In these critical conditions, the then Prime Minister *Liaqat Ali Khan* [Oct. 1st, 1895 - Oct. 16th, 1951] passed a resolution through constituent assembly of Pakistan on the motion of *Allama Shabbir Ahmad Usmani* [1886-1949], a renowned religious scholar and prominent activist of freedom movement, on March 12, 1949. This resolution is called "Objectives Resolution" and provides basic guidelines about constitutional development and legislation. Objectives resolution served as policy document in the legislative and constitutional developmental process afterwards and it is the part of the 1973 AD's

constitution which is the in vogue constitution of the country. Some of the remarkable points of this resolution are as under:

a. The sovereignty over the universe vests in the Almighty Allah only, and, the people of Pakistan will act His vicegerents and will utilize this trust through their representatives.

b. Any legislation contrary to the instructions of the *Qur'an* and *Sunnah* will not be done in the country.

c. Islamic values of social justice, tolerance, equality and democracy will be promoted enabling the Muslims to fashion their lives according to Islamic principles, individually as well as collectively.

d. Minorities living in Pakistan will be provided with optimum religious freedom and their worship places as well as culture will be safeguarded.

e. Judiciary will be free and independent.

f. All citizen of Pakistan will be guaranteed the provision of basic rights without any discrimination.

g. The system of government will be based on federation and attached units will be granted autonomy to the reasonable level.

The prominent legislation after the creation of Pakistan till the promulgation of Muslim Family Laws Ordinance 1961 AD, which is made in sphere of Family Laws, is as under:

I. The West Punjab Muslim Personal Law Shariat Application Act, 1948 AD: This act came into force on March 15th, 1948. It abrogated the customary rules regarding the succession and inheritance. It implemented *Shariah* injunctions for deciding the cases related with special property of females, succession, betrothal, marriage, divorce, dower, adoption, guardianship, minority, legitimacy, bastardy, family relations, wills, legacies and gifts etc. where both parties are Muslims (Farani, 2011, p. 966).

II. The Muslim Personal Law (Shariat) Application (Sindh Amendment) Act, 1950 AD: This act) was implemented on May 17th, 1950 in province of Sindh. It amended the section 1 and section 2 of Muslim Personal Law Shariat Application Act XXVI of 1937 with the inclusion of agriculture land for the purpose of distribution in inheritance according to the instructions of *Shariah*. (Farani, 2011, p. 977)

III. The Punjab Muslim Personal Law (Shariat) Application (Amendment) Act, 1951 AD: This act came into force for amendment and addition of new clause in the West Punjab Muslim Personal Law Shariat Application Act, 1948. Section 2 of this act was amended for the inclusion of agriculture land in inheritance for the purpose of distribution as per guidelines of Muslim Personal Law (Shariat) where both parties are Muslims (Farani, 2011, p. 978).

IV. Sind Marriages and Divorces Registration Act 1955 AD: This act (Sindh Act No. VIII of 1955) was promulgated on April 30th, 1955. It enforced the registration and divorce registration mechanism in the province of Sindh. For this purpose, *Qāzīs* and registrars had to be appointed. In case of contravention of act, penalty of five hundred rupees or one month imprisonment or both was suggested (Farani, 2011, p. p. 295).

Pakistan was the wish of Indian Muslims for shaping their lives according to Qur'an and Sunnah. Therefore, the first legislative assembly passed a resolution conferring the right of inheritance to females in 1948, who were deprived of this right since long due to customary law. At present, there are two types of laws about the family matters in Pakistan;

a. The Family Laws which are concerned with Muslims only. They are named as Muslim Family Laws.
b. The Family Laws which are related to the persons, belonging to religions other than Islam such as Hindus, Sikhs, Parsis (Zoroastrians)and Christians etc.

As the current study is related with the Muslim Family Laws, therefore, significant legislations developed after the creation of Pakistan are discussed in the following:

1.1.3 Muslim Family Laws Ordinance 1961

Muslim Family Laws Ordinance 1961, hereafter MFLO, was promulgated by the then President of Pakistan, Field Marshal Ayub Khan[16] [May 14, 1907- April 19, 1974] on July 15, 1961. Whenever Muslim Family Laws are discussed in Pakistan, it is taken for Muslim Family Laws Ordinance 1961. Therefore, it is discussed with some detail;

Muslim Family Laws Ordinance 1961 AD was promulgated in the light of the report submitted by the Rashid Commission in 1956 AD (Tonki W. H., 2003, p. 30). It seems pertinent to review the Rashid Commission Report in order to establish the connection/ relation between them for better understanding.

In 1954 AD, Muhammad Ali Bogra [17], the then prime minister of Pakistan, married a woman from his subordinate staff as second wife while legal continuation of his first marriage (Abbot, 1962). APWA (All Pakistan Women Association) [18] protested largely against it which pressurized the prime minister to announce a commission for reforms in marriage and Family Laws. The protest of APWA was not unexpected in that situation as it started campaign against the polygamous marriages some months right before the second marriage of the prime minister. The unprecedented migration of Muslims from India to Pakistan, in result of the partition in 1947 AD, brought pains for a large number of migrants. Many were killed, injured and a large number of families dispersed. The whole situation brought calamities to those women who lost their families. The government and people extended their assistance for the rehabilitation of migrants. Some of people took shelter less women as second wives and the number of polygamous marriages increased unprecedentedly. After some time, the reports of mal treatment with

first wife began to spread in society, alarmingly. A bill was tabled in the provincial assembly of Punjab by *Begum Salma Tassaduq Hussain*[19] in which reforms in marriage, divorce and inheritance law were demanded (Islahi, 2004). A large scale criticism forced the assembly to ignore this bill (Rehman, 1978). APWA was raising its voice against the mal treatment of husbands to their first wives and it was demanding regularizing the marriage and divorce regulations. A committee was also formed by APWA for suggesting ways for the welfare of women. Meanwhile, a scholar *Shah Muhammad Jaffar Pholwari* [20] came with suggestions for reforms in family matters in 1954, which were published in a shape of pamphlet as well as in the monthly "*Saqafat*" the organ of *Idara Saqafat e Islamiyya* Lahore. [21]

The commission was named as "Marriage and Family Laws Commission". The commission was notified on August 4, 1955 and *Khalifa Shuja ud Din*[22] was appointed as the Chairman of the commission (Pakistan, 1956, p. 1563). Other members of the commission are as under:

Dr. Khalifa Abdul Hakim[23]	Secretary
Maulana Ihtesham ul Haq Thanvi [24]	Member
Begum Jahan Ara Shahnawaz [25]	Member
Begum Anwar G Ahmad [26]	Member
Begum Shams U Nihar Mehmood [27]	Member
Enayat ur Rehman [28]	Member

The first meeting of the commission was held on October 5, 1955, chaired by the *Khalifa Shuja ud Din*. Unfortunately, the Chair of the commission died on the next day October 6, 1955. Afterwards, the retired Chief Justice of Pakistan *Abdul Rashid* [29] was appointed as new chairman of the commission (Pakistan, 1956, p. 1563). The second meeting of the commission held on November 30, 1955 under the chairman ship of Justice (retired) *Abdul Rashid*. The commission decided to publish a questionnaire in print media as well as printing and distribution of the questionnaire in the public to get their opinion. It was also decided to publish the questionnaire in multi languages.

The questions which were asked in the questionnaire are provided in "Annex-A" in the end of the thesis.

1.1.4 The West Pakistan Rules under Muslim Family Laws Ordinance, 1961: These rules were enacted on July 10, 1961 and they were published in Gazette of Pakistan, extra ordinary, on July 20, 1961. These rules further explain the procedure and implementation of MFLO 1961 regarding Arbitration Council[30], registration of marriages, polygamy, *Nikahnama* and its filling procedure, payments of fees, registration of marriages solemnized outside Pakistan and lodging of complaints/appeals under Muslim Family Laws Ordinance 1961 (Farani, 2001, pp. 108-117).

1.1.5 The Punjab/Sindh/NWFP/Baluchistan Muslim Personal Law (Shariat) Application Act, 1962 (West Pakistan Act V of 1962): This act was enacted on 31st, December 1962 in order to amalgamate and revise the provision for the application of Muslim Personal Law (Shariat) in the provinces of Punjab, Sindh, NWFP and Baluchistan. This act resembles to the West Pakistan Muslim Law (*Shariat*)

application Act, 1948 and suggests for the application of Muslim Personal Law in suits where parties are Muslims. It terminated the limited estates[31]under customary Law. This act applied *Shariat* to wills and entirety, devised procedure for the devolution of property on the termination of limited estate and upon the death of legdee-in-enjoyment[32]. This act repealed the following acts:

a. The Punjab limitation (custom) act, 1920[33]

b. The Punjab Custom (Power to Consent) Act, 1920[34]

c. The North-West Frontier Province Muslim Personal Law (Shariat) Application Act, 1935 [35]

d. The Muslim Personal Law (Shariat) Application Act, 1937 in its application to West Pakistan [36]

e. The Punjab Muslim Law (Shariat) Application Act, 1948 [37]

f. The Muslim Personal Law (Shariat) Application (Sindh Amendment) Act, 1951 [38]

g. The Bahawalpur State Shariat (Muslim Personal Law) Application Act, 1950 [39]

h. The Khairpur State Muslim Female Inheritance (Removal of Customs)Act,1952 [40]

1.1.6 The Punjab/Sindh/NWFP/Baluchistan Muslim Personal Law (Shariat) Application (Amendment) Ordinance, 1963: This Ordinance was enforced by the Governor, West Pakistan in order to amend the section 7(2) [41] of Punjab/Sind/NWFP/Baluchistan Muslim Personal Law (Shariat) Application Act, 1962.

This ordinance was published in Gazette of West Pakistan, Extra ordinary, on November 21, 1963.

1.1.7 The Punjab/Sindh/NWFP/Baluchistan Personal Law (Shariat) Application (Amendment) Act, 1964: West Pakistan Act XXVIII of 1964 was published in Gazette of West Pakistan, Extra ordinary on April 15, 1964 to amend[42] section7(2) of Punjab/Sind/NWFP/Baluchistan Muslim Personal Law (Shariat) Application Act, 1962 (Farani, 2011, p. 938).

1.1.8 The Punjab/Sindh/NWFP/Baluchistan Family Courts Act, 1964 (West Pakistan Act No. XXXV of 1964): This act was enforced on November 2, 1965. The objective of this act was the establishment of special courts for quick settlement of family suits. This act provides information about the procedure, jurisdiction, qualification of Family Court Judge, place of sitting, trial proceedings, procedure of appeal, Contempt of Family Court and Court fee (Farani, 2011, p.151).

1.1.8 The West Pakistan Family court Rules, 1965: These rules were published in Gazette of West Pakistan, Extra Ordinary, on November 2, 1965. These rules were intended for the West Pakistan Family Courts Act 1964, in order to clarify and explain the Family Court proceedings, Appointment of Family Court Judge, maintain the register of suites/cases, decrees, order and appeals etc. (Farani, 2011, p.270).

1.1.9 Organizations working for Islamization in Pakistan

a. Council of Islamic Ideology: The Council of Islamic Ideology is a constitutional body that's advises the legislature certain whether or not a law is repugnant to Islam, namely to the Qur'an and Sunnah. The Council of Islamic Ideology was

established as Advisory Council of Islamic Ideology on August 1, 1962 under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1962, Selatan provided for the constitution of the Council (Articles 199-203), its Functions (Article 204), rules of procedure (Article 205), and the establishment of Islamic Research Institute (Article 207).

Advisory Council of Islamic Ideology was re-designated as the Council of Islamic Ideology in Article 228 of the 1973 constitution with provisions for its composition (Article 228), Procedure for reference to the Council (Article 229), its Functions (Article 230), and Rules of Procedure (Article 231). The office of the council was located in Lahore where it continued to work until 26 September 1977 when its Offices were shifted to Islamabad. The Council shifted to its own building in September 1995.

Since 1962 the Council has competition held 190 meetings, revised laws of Pakistan, recommended several legislations and submitted more than 90 reports. Plans include the present, in addition to reviewing laws, submission of recommendations to parliament and dealing with references from the president, governors and both houses of Parliament, conducting research, publications, seminars, conferences and a website.

Functions (As per Article 230 of the Constitution);

1. The functions of the Islamic Ideology Council shall be:

a. to make recommendations to the *Majlis -e- Shoora* (Parliament) and the provincial assemblies as to the ways and means of enabling and encouraging the Muslims of Pakistan to order their lives individually and collectively in all respects in accordance with the principles and concepts of Islam as enunciated in the Holy Quran and Sunnah ;

b. to advise a House , a Provincial Assembly , the President or a Governor on any question referred by to the Council as to whether a proposed law is or is not repugnant to the Injunctions of Islam ;

c. to make recommendations as to the measures for bringing existing laws into conformity with the injunctions of Islam and the stages by seeking measures which should be brought into effect ,

d. and to compile in a suitable form , for the guidance of *Majlis -e- Shoora* (Parliament) and the Provincial Assemblies , seeking injunctions of Islam as can be given name legislative effect .

2. Where a House , a Provincial Assembly , the President or the Governor , as the case may be , considers that, in the public interest , the making of the proposed law in relation to the question which arose should not be postponed until the advice of the Islamic Council is furnished, the law may be made before the advice is furnished; provided that, where a law is referred by for advice to the Islamic Council and the Council advises did the law is repugnant to the Injunctions of Islam , the House or, as the case may be , the Provincial Assembly , the President or the Governor shall reconsider the law so made .

3. The Islamic Council Shall submit its final report within seven years of its appointment , and shall submit to annual interim report. The report , whether interim or final , shall be laid for discussion before both Houses and each Provincial Assembly within six months of its receipt and [*Majlis -e- Shoora*

(Parliament)] the assembly , after considering the report , shall enact laws in respect thereof within a period of two years of the final report.

b. Federal Shariat Court of Pakistan: The Federal Shariat Court was established by the president's order no.1 of 1980 as incorporated in the constitution of Pakistan, 1973 under chapter 3A. The Court is a unique institution with no parallel in the entire Muslim world. It is backed by powerful provisions of the constitution. The preamble to the constitution explicitly affirms that sovereignty over the entire universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust. Article 2A that lays down the principles and provisions set out in the objectives resolution are a substantive part of the constitution. Article 227 makes it incumbent that all existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy Qur'an and the Sunnah of the Holy Prophet (SAW), and chapter 3 pertains to the functions and organization of the Federal Shariat Court, which empowers and entrusts the court with the responsibility to examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam as laid down in the Holy Qur'an and the Sunnah of the Holy Prophet (SAW). Law includes any custom or usage having the force of law but does not include the constitution, Muslim personal law, any law relating to the procedure of any court or tribunal.

Jurisdiction of the Federal Shariat Court

The Federal Shariat Court has jurisdiction to settle on matters in its original. , revisional, review and appellate jurisdictions and to decide a reference made to it.

i. Original and Suo Moto jurisdiction: Article 203-D of the constitution empowers the court to examine and precisely the question, whether or not any law or provision of law is repugnant to the injunctions of Islam. This court has examined during the past years 512 federal and 999 provincial laws suo moto on the touch stone of injunctions of islam and have found 55 Federal and 212 Provincial Laws as repugnant to these injunctions.

ii. Revisional Jurisdiction: Article 203-DD of the Constitution confers jurisdiction on the Court to call for and examine the record of any case decided by any criminal court under any law relating to the enforcement of *Hudood* for the Purpose of satisfying even to the correctness itself, legality or propriety of any finding, sentence or order passed by recorded or, and not to the regularity of any proceedings of, such court and may, when calling for such record, direct the suspension of the execution of any sentence and, if the accused is in confinement , that he be became on bail or released on his own bond pending historical examination of the record.

iii. Appellate Jurisdiction: The Court appellate jurisdiction exercises in *Hudood* cases registered under the *Hudood* laws visited

i) The offenses against property (Enforcement of *Hudood*) Ordinance, 1979

ii) The offense of *Zina* (Enforcement of *Hudood*) Ordinance 1979

iii) The offense of *Qazaf* (Enforcement of *Hadd*) Ordinance, 1979

iv) The Prohibition (Enforcement of *Hadd*) Order, 1979

iv. Jurisdiction Review: Clause (9) of Article 203 of the Constitution empowers the Court to review any given decision or order made by it.

1.2 Review of the Reservations of Religious Circles on MFLO, 1961

From the very beginning, religious circles expressed their reservations over the Muslim Family Laws Ordinance, 1961AD and some of sections were considered against the teachings of Islam. The debate started when Commission on Marriage & Family Laws, known as Rashid Commission submitted its report to the government, and published in gazette of Pakistan on June 20,1956. A member of the commission, *Ihtesham ul Haq Thanvi* who was a religious scholar, wrote a note of dissent on these recommendations, however, this note was published in next gazette of Pakistan separately from the report of commission on June 30, 1956. Apart from this, religious circles raised their observations on the large scale and government postponed implementation of these recommendations, resultantly.

In October, 1958, then Army Chief *Ayub Khan* ousted the political government and imposed martial law in the country. He promulgated Muslim Family Laws Ordinance in 1961, which encompassed a large share from *Rashid* Commission's recommendations. This ordinance was opposed by religious circles also.

Here is the review of these sections which are most debated along with analyzing the reservations of religious circles:

1.2.1. Succession (Section 4 of MFLO 1961): Section four of the MFLO 1961 reads as:

"In the event of death of any son or daughter of the propositus before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stripes, receive a share

equivalent to the share which such son or daughter, as the case may be, would have received if alive".

This section awarded the right of inheritance to grandchildren from pre-deceased son or daughter to such amount if the son or daughter would have alive. The *ulema* opposed this section rigorously and termed it un-Islamic. Arguments of *ulema* are as under:

a. It is an emotional decision to award grandson or daughter being more deserved than his mother who has not any right to get inheritance even in this ordinance, too. It is proved from this example that inheritance is not divided on the principle of deserving or needy rather it is distributed on the principle of closeness to the deceased (Shafi, 1999).

b. It has been proved by the authentic book of Hadith, *Sahih Al-Bukhari*, stating the decision of *Hazrat Zaid bin Thabit* (R.A) as "*the grandson will not get share in inheritance in presence of son"* (Ismail, 1373 H).

c. A person can get share in inheritance in case of death of his predecessor only in the life of the said person. And, in this case, the pre-deceased son gets share in inheritance, which is not permissible (Tonki W. H., 2003).

Apart from above mentioned points, the arguments of supporters of this section, are as under:

a. When Islamic jurists allow grandfather to vicegerent of some one's deceased father, then, as per this principle, why the orphan grandson cannot become vicegerent of his predeceased father?

b. Inheritance will be divided in the persons where both parties can inherit from each other e.g. husband-wife, father-son. If grandfather can get share from grandson's inheritance in the absence of his father, why cannot grandson get share in grandfather's inheritance in the absence of his father?

c. Grandson is connected with grandfather via his father, not his paternal uncle. If such uncle dies, grandson cannot anything in inheritance, and in the same way, if such uncle is alive, how can he oust the said grandson?

d. According the notions of sympathy, kindness and mercy to expel orphan grandchildren from inheritance who are in dire need of assistance (Ahmadyar, 1999).

e. The right of grandson for inheritance is based on the principle of acting or substitution. When the original inheritor found absent (dead) then his vicegerent will become eligible for getting share in inheritance e.g. absence of father makes grandfather eligible for share in inheritance, such is the case of son, whose absence makes grandson eligible for getting share from his grandfather's inheritance (Usmani M. U., 1965).

1.2.2. Review of both Standpoints

After the analysis of both schools, it comes to comprehend that share for orphan grandson has not been mentioned in basic sources of Islam i.e. Quran and Hadith. Similarly, classical juristic school of thoughts unanimously agree on the point that grand children cannot get chare in the inheritance of grandfather while their father or mother has been died in life time of their grandfather.

Rulings from the Holy *Qur'an*; The Holy Qur'an says in this regard;

و ڝ ُي و فِ اولا دِ ل ُدْ ه رنِمِ وِ ي ِ يْ اثْ آ الظِ ح

ُك كذ ن

" *Allah directs you as regards yours children's (inheritance) to the male, a portion equal to that of two females*" (Al-*Qur'an*, 04: 11).

In this verse children is the substitute of Arabic word *Awlād* which is plural in itself and its singular is *walad*. Its literal meaning is '"to beget", hence, children are begotten from their father. So, the male (son) and female (daughter) both are included in its meaning because both are begotten. It merits to mention that meaning of *walad* is used in two senses:

i. Real: one begotten without intermediary, as son or daughter.

ii. Metaphorical: one is begotten with intermediary as grandson, granddaughter, grandson's son , grandson's daughter etc. who are issues of sons.

The issues of daughter , maternal granddaughter and maternal grandson are not included in its meaning in as much as the lineage is established from the father's side. The issues of a son are like the father's own issues; and the issues of a daughter belong in lineage to their own father and grandfather; they do not so belong to their maternal grandfather. They are merely relatives, which are called *zawil-al-Arhām*)ذوی االرحام(in Qur'anic terminology. This rule is not customary one but it is a well-known fact. Therefore, it is established that the deceased's own issues without liaison are included in the actual meaning of "walad" and therein the grandson and granddaughter are included in metaphorical meaning. Moreover, the maternal grandson and maternal granddaughter are excluded from the definition of "*walad*"

even metaphorically. Using any word in real or metaphorical sense, following points should be kept in mind:

i. Real and metaphorical meaning both cannot be taken at the same time and in the same context. For the word *walad* (issue) cannot give the meaning, "son and daughter" and "grandson and granddaughter" at the same time and in the same circumstance. That is why, in the presence of the son, his issues i.e. the grandson and granddaughter do not obtain any inheritance. It is not possible that that word *walad* would give real meaning and metaphorical meaning also.

ii. As long as the actual meaning of a word exists, it is not justified to take it in the metaphorical meaning. That is why, in the presence of (son and daughter) the real meaning of the word "offspring" shall exclude the grandson, granddaughter, being the metaphorical meaning of the word *awlad*.

Therefore, the meaning of the certain verse of the Holy Qur'an [04:11] is that the grand son and granddaughter, in the existence of son and daughter, shall have no right whether the grand son and granddaughter are the children of the living or dead son (Rehman, 1978, pp. 58-61).

In another verse of the same chapter Nisa [04:33] it is stated that;

و لوا ٍوالمّ ان لعجاا رل ابُ روا ْ نلوانِ قا د لوا للك ك ت ِ لا اهمِ

"*to (benefit) everyone, we have appointed shares and heirs of property left by parents and relatives*."

It is narrated from *Abdullah bin Abbas* (RA) that the term "*mawalī* (موالی)" in the said

verse stands for "*asaba* (عصبة)" which means residuaries who take away all left over

shares of inheritance after its distribution between *zawil-al-forūdh*)ذوی الفروض(and *zawil-al-arhām*)ذوی االرحام(. This report affirms that grandson and granddaughter have no right to get share from the area of *asaba* as they are not counted in this area. Similarly, the said verse [04:33] describes further another term of "*aqrabūn*")اقربون(which is plural of the word "*aqrab*")اقرب(and it is a superlative adjective derived from the word "*qurb*")قرب(meaning near. Therefore, *aqrab*)اقرب(means nearer and in context of verse it means nearer in relationship.

The closeness in relationship is of three types:

i. There is no liaison in between, as between father and son; or lesser number of intermediaries as between the deceased and the grandson compared to the great-grandson.

ii. If they are of same degree, the relationship of one is nearer than of other, as real brother is nearer in relationship than the consanguine brother; the mother and father bother common in "real" relationship whereas in consanguine only father is common.

iii. if the two equal degree, the relationship of the one should be nearer, as one of the son and father, though both of them are close to the deceased without any liaison, the son is closer to deceased whereas the father is not. Hence the son is closer.

The Qur'anic verse [04:07] lays down:

"*from what is left by parent and those nearest related, there is a share for men*"

It means that in the existence of nearer, the remoter ones will stand excluded. Thus the son is nearer to father than grandson and brother is closer to another brother than nephew because they are connected without any liaison, so their presence will exclude the participation of remote relatives in the distribution of inheritance, even their father is alive or dead.

Rulings from the Traditions of the Prophet (SAW):

عن ابــن عباس قال قال رسول الله صلى الله عليه وسلم: ألحقوا الفرائض بأهلها فما بقي فهو لأولى رجل ذكر۔

Abdullah bin Abbas (RA) narrates that the Prophet Muhammad (SAW) said: "give the fixed shares in inheritance to the sharers; whatever is left over, that is for the nearest male related to the deceased" (Al-Nowavi, 1996).

It is confirmed from this *hadith* of Prophet (SAW) that the man who is entitled to inherit personally or through a male related to the deceased is "*asaba* (عصبة)", whose shares are not fixed. So, whosoever is closer to the deceased becomes the heir and brother compared to nephew and son compared to grandson are closer; therefore, closer will exclude the remoter one.

Sunan Ibn-e-Maja, reproduced a tradition of the Prophet *Muhammad* (SAW) with changes in words, to some extent, in the above mentioned hadith.

The same narrator *Abdullah bin Abbas* (RA) describes the tradition of Prophet *Muhammad* (SAW) as:

عن عبدالله بن عباس رضى الله عنه قال: قال رسول الله صلى الله عليه وسلم: اقسموا المال بين أهل الفرائض على كتاب الله فما تركت الفرائض فلأولى رجل ذكر

33

" *Distribute wealth among those who are entitled to shares of inheritance, according to the Book of Allah, then whatever is left over goes to the nearest male relative*" (Qazweeni).

Similar type of tradition is recited in the *Sunan Abu Dawood*:

عن عبدالله بن عباس رضی الله عنه قال: قال رسول الله صلی الله علیه وسلم: اقْسِمُوا الْمَالَ بَيْنَ أَهْلِ الْفَرَائِضِ عَلَى كِتَابِ اللَّهِ، فَمَا تَرَكَتِ الْفَرَائِضُ فَلِأَوْلَى ذَكَرٍ

" *Narrated by Abdullah bin Abbas: the Prophet (SAW) said: "Divide the property among those whose share have been prescribed in the Book of Allah, and what remains from the prescribed shares goes to the nearest male heirs*" (Sajistani, 2006).

The above mentioned traditions of Prophets prove that during the era of companions of Prophet (SAW), there was a consensus that in presence of closer one the remoter one shall not be the heir. Not a single assertion of any of the companions can be cited against this position.

Views of the Various Jurists: The renown *Hanafi* scholar *Imām Sarkhasi* [d.1096 AD] transmits in his master piece *Al-Mabsūt*; if real (*sulbi*) issues and issues of such issues, are somehow found together, and there is a son of the deceased amongst the real issues, the grandson and granddaughter of the deceased or any one of the two shall get nothing, in as much as the real son being in the meaning of real issues shall be entitled to the whole belongings. When the real meaning of a word can be determined and acted upon, its metaphorical meaning shall be unnecessary in the same. It would be needless to take a word both in the actual and metaphorical

meaning at one hand and same time and in the same context as well as situation (Sarkhasi, vol. 29 p.141).

Another eminent *Hanafi* scholar, *Allama Ibn-e-Nujaym* [d.970 H] viewed in his book namely, *Al-Bahr-ul-Rāiq* that "the grandson gets barred in the attendance of the son, as the son compared to grandson is nearer. For this reason, the grandson and granddaughter are not inheritors in the presence of sons either on the ground of "*asūbah* عصوبة (consanguinity)" or "*fardiyah* فرضية (being a share holder)" (vol.8, p. 494).

As per *Malikī* rule of conduct, the authentic book, *Mowatta Imām Malik* [d. 795 AD], commented by *Al-Zarqanī* [d. 1099 H] states that; "the issues of the sons, in the absence of sons, shall be the substitutes of the sons. Hence the males (of them, the grandsons) shall be like males (of them, the sons) and the females (of them, the granddaughters) like the females (of them, the daughters). As they are the heirs, so are these the heirs. And as they exclude, (the nearer excluding the remoter) so shall these exclude. Similarly, if the real (*sulbi*) son and the son of the son are found together and the son is entitled to inherit, with him there is no inheritance for the grandson; the grandson shall get nothing" (vol.3, p.412).

The great scholar, writer and philosopher *Ibn-e-Rushd*, known as Averroes in west [d. 1198 AD] in his enormous book *Bidāyt-ul-Mujtahid* reports consensus of the jurists on the point that the issues of the son shall be heirs only when there is no son of the deceased (vol.11, p. 340).

As per *Hanbalī* school of thought, *Ibn Quddāmi Maqdisī* [d. 1223AD] reported in his famous book "*Al-Moghnī*" that " those who are closer to the deceased are better entitled to the inheritance than those who are farther.

Therefore, it can be suggested that orphan grandson should be given share from the one third part of total inheritance, for which a grandfather can make a testament and necessary legislation can be done in this regard within the preset jurisdictions of Islamic teachings.

1.2.3. Registration of Marriages

According to section five of MFLO 1961, registration of marriages was made compulsory and a man if found violating this, can be imprisoned up to three months or fined up to one thousand rupees or both. The section five of the said ordinance says:

> (1) Every marriage solemnized under Muslim Law shall be registered in accordance with the provisions of this Ordinance.
> (2) For the purpose of registration of marriage under this Ordinance, the Union Council shall grant licenses to one or more persons, to be called *Nikah* Registrars, but in no case shall more than on *Nikah* Registrar be licensed for any one Ward.
> (3) Every marriage not solemnized by the *Nikah* Registrar shall, for the purpose of registration under this Ordinance be reported to him by the person who has solemnized such marriage.
> (4). Whoever contravenes the provisions of such-section (3) shall be punishable with simple imprisonment for a term which may extent to three months, or with fine which may extend to one thousand rupees, or with both.

(5). The form of *Nikahnama*, the registers to be maintained by *Nikah* Registrars, the records to be preserved by Union Councils, the manner in which marriage shall be registered and copies of *nikhanama* shall be supplied to parties, and the fees to be charged thereof, shall be such as may be prescribed.
(6) Any person may, on payment of the prescribed fee, if any, inspect at the office of the Union Council the record preserved under sub- section (5), or obtain a copy of any entry therein (Farani, 2011).

1.2.4. Views of Religious Scholars

A prominent scholar, *Mufti Muhammad Shafī* [d. Oct 06, 1976] commented on the said section as if this section is meant for a marriage (*Nikah*) which took place without the registration, then it is the against the teachings of Islam and consensus of *ummah*. And, if it is meant for the administrative purpose as to accept validity of marriage but non-registration is considered as a violation of administrative order, it seems, then, lawful because the government has the authority to issue such orders as and when required in specific circumstances (Shafi, 1999, p. 42).

While suggesting reforms in MFLO 1961, *Mufti Muhammad Shafī* suggested reducing the severity of punishment which was inappropriate in his opinion (Shafi, 1999, p. 53).

Mufti Wali Hassan Tonki [d. Feb 03, 1995] criticized the registration of marriages and termed it an extra condition for the deed of marriage. His opinion is as under:

a. The process of Marriage (*Nikah*) should be made easy rather than making it complicated.

b. The procedure of marriage is unconditional while in this ordinance (MFLO 1961) it has been made conditional. It is unlawful according to the teachings of Islam to declare a pure unconditional matter (*mutlaq)* as conditional *(moqayyid)*.

c. The conditions of registration of marriage, *Nikah khawan* (the person who solemnizes marriage) or *Nikah* Registrar (marriage registrar) are not mentioned in Islamic *Shariah* (Tonki W. H., 2003, p. 152).

1.2.5. Review of Religious Scholars' Reservations

While reviewing the standpoints of *ulema* towards MFLO 1961, it was disclosed that these reservations were brought up in the early days of MFLO 1961 announcement and it was not implemented practically at that time, therefore, there were some misunderstandings/ambiguities in MFLO 1961. After its practical implementation, ambiguities were removed e.g. the status or validity of marriage solemnized under Islamic teaching but did not register as per directions of MFLO 1961, whether it would be valid or vice versa in the light of said direction. Later on, this issue was solved and honorable court explained this section of MFLO 1961 and ruled:

> "Non-registration of Muslim marriage does not,, in itself invalidate marriage if it is otherwise proved to have taken place in accordance with the requirement of Islamic law. Non-registration may, however, cause some doubts on existence and solemnization of marriage if factum of marriage is in serious dispute between parties to marriage" (NLR, SCJ 196, 1990).

In some cases the Honorable Federal Shariat Court of Pakistan validated the marriage as legal without registration or any documentary proof (PLD, 1984).

However, documentation and registration of marriages can save from many complications in future and in case of dissimilarity between the couple claiming or refusing contracting marriage. For example, a man namely, *Sher Muhammad* claimed contracting of marriage with woman namely, *Zubaida Bibi* while the woman denied it. The said marriage was not registered; therefore, subordinate judiciary expelled the claim

of said man. Similarly, the High court maintained the judgment of lower court and finally Supreme Court of Pakistan did the same and maintained the judgment of lower court (NLR, SCJ 182, 1984).

From the above mentioned judgments it is clear that non-registration cannot nullify the marriage deed in itself but it is a documentary proof for a couple claiming themselves as husband and wife.

Mufti Muhammad Shafī [d. 1976] showed tendency towards the lawfulness of registration of marriage form administrative point of view while *Mufti Wali Hassan Tonki* [d. 1995] took it unjustified to add the condition of registration as it would complicate the marriage process.

Remarkable scientific advancement and extraordinary growth in population make it necessary to document the marriages in order to avoid any mishap in future and facilitate the coming generations in identification and issuance of identity certificates. This documentation will enable government in planning for future strategies and provision of basic amenities.

Therefore, it is an administrative matter and under the notion of *Siyasa Shariyya,*[43] Islamic government can issue such directions or rules necessary for the smooth functioning of government affairs and the welfare, interest and good of the public.

1.3 Introduction of Muslim Family Laws of Malaysia

1.3.1 Introduction of Malaysia

Malaysia is situated in the south east Asia. It won independence on August 31, 1957. Its total area is 329,487 km^2 and population is recorded as 28.3 million in 2010's census in comparison to 23.3 million recorded in 2000's census (Department of Statistics). Geographically, it is divided into two parts of east and west Malaysia, which are separated by 640 km long South China sea. Malaysia is consisted of 13 states and three Federal Territories. States of Sarawak and Sabah, and Federal Territory of Labuan, are situated in East Malaysia. While the states of Selangor, Penang, Pahang, Kedah, Kelantan, Johor, Negeri Sembilan, Melaka , Perlis, Terengganu and Perak and Federal Territories of Putra Jaya and Kualalumpur are situated within west Malaysia.

Its earlier name was Malaya which was taken from the name of a river situated in Sumatra (Indonesia). It was replaced by Malaysia when Singapore joined the Federation of Malaysia on September 16, 1963 but this joining proved temporary and Singapore separated on August 9, 1965.

Administratively, Malaysia has been divided into two parts,; which are Federal Territories and States. There are three Federal Territories in Malaysia i.e. Putra Jaya, Kualalumpur and Labuan. While 13 States are situated in East and West Malaysia, namely Selangor, Johor, Kelantan, Penang, Pahang, Negeri Sembilan, Kedah, Sarawak, Sabah, Terengganu, Perlis, Perak and Malacca (Melaka).

Historically, the Malay Peninsula was a land bridge between Asian's soils and South West Pacific soils. Malaya had been inspired deeply by foreign influences. It had embraced effects of Indian, Chinese, Muslim and European invaders. Chinese archives

state business ties between India and China as early as seventh century BC, which suggest possibility of trade links with Malaya Peninsula being in the mid of trade route. In that age, Indians were interested in settlements as compared to Chinese who had tendency in trading. Hence, Chinese did not work out any significant impressions on peninsula, while Indians left long lasting impacts over the inhabitants of peninsula. Many Indianized states emerged on the eastern coast of Malaya peninsula in the result of the influential role of neighboring Indianized kingdoms of *Funan* [44], Cambodia [45], *Champa* [46], *Sri Vejaya* [47] and *Majapahit* [48]. Being powerful than local states, these Indianized kingdoms subjected the surrounding areas leaving religious, political , lingual and social influences over the local traditions and customs. The Hindu-Buddhist influences over political and cultural aspects of peninsula reached to its end with arrival of Islam in the region in thirteenth century. Most probably, Muslim traders introduced Islam in the peninsula, who were from India by and large.

Based on historic sources, state Melaka was established by a refugee Prince *Parmeswara* (d. 1414) from the sultanate of *Palembang* (Indonesia), who married a Muslim princess from *Pasai* [49] and embraced Islam and changed his name as *Megat Iskander Shah*. The Melaka state expanded and surrounding areas merged in it, resultantly, the whole Malay Peninsula came under his control in the mid of fifteenth century. This sultanate remained for almost a hundred years and left deep religious and cultural consequences (Hamza, A First Look at the Malaysian Legal System, 2009).

Colonialists reached to Malaya Peninsula in the start of sixteenth century when a Portuguese commander Afonso de Albuquerque (d. December 16, 1515) landed there in 1511 AD. Portuguese were followed by Dutch who arrived in 1641 AD and British who

stepped there in the end of 18th century.

Apparently, British came in search of trade opportunities under the flag of East India Company but they had potential intentions for permanent settlements. British colonization began in 1791, when Sultan of Kedah failed to regain Penang from British control. Prior to this, the Sultan leased the Penang Island to British for military assistance against the enemy. The British failed to fulfill their words when Sultan was attacked in 1821, consequently, the Sultan tried to get back the Penang from British but he could not succeeded in his efforts. Eventually, the Sultan was compelled to accept an annual pension for him and his successors in return of handing over Penang to British authorities. On other hand, state of Melaka was in Dutch control but they surrendered it to British in 1795 due to the unfriendly situation caused by Napoleonic wars. British returned Melaka state to the Dutch in 1818 but under the Anglo-Dutch treaty of 1824, Dutch exchanged it in return of Benkulen Island of Sumatra [Indonesia] (Maxwell, 1924). Thus, British acquired Penang, Melaka and Singapore till 1824. Due to the clashes between various states, the law and order situation was worsened which was contrary to British interests in Malaya Peninsula. Therefore, British authorities inked treaties with different states at one hand, and at the other, a secret deal was reached with Siamese (former kingdom of Thailand), too. The states agreed, in return, to allow appointment of British residents as advisor in their respective states. Seeking the advice of residents was compulsory for the rulers of states before taking any action. Hence, the following four tiers of British influence emerged in the Malay peninsula:

I. The Straits Settlement: Penang, Melaka and Singapore were declared British colony and named as Straits Settlement. English law was applied on the notion of basic

application. The judiciary was allowed to modify English law so as to accommodate the personal laws of the local inhabitants. In case of conflict between English law and customary law, the preference was to be given to the customary law.[50]

II. The Federated Malay States: Those states who accepted the British offer of protection in return of allowing British residents in their respective states were named as Federated Malay States (FMS). States of Perak, Selangor, Pahang and Negeri Sembilan were in this category. It was compulsory for the Sultan of the states to seek the consultation of resident and act upon it. These states established a federation with a centralized system of government by a British resident general.

Malay adat (customary) law tailored by the regulations of *Shariah*, was applicable in these states at time of British intrusion. Malay adat law was most often concerned with the customary land term and *harta sepencarian* (assets jointly obtained during marriage by wife and husband).

III. The Un-federated Malay States: Like FMS, some states accepted the British offer of protection and assented to the appointment of British residents. They were British protected states. They included Johor, Kedah, Kelantan, Terengganu and Perlis. They were called Un-Federated States (UMS) for the reason that they were not under the condition of mandatory consultation of residents. Thus they benefitted from autonomy to some degree.

IV. British Protectorates: Brunei, North Borneo and Sarawak were acknowledged as British protectorates. These states were under private administration until 1946, when they were colonized , formally (Maxwell, 1924, pp. 132-134).

Before the advent of British in this region, the law in vogue was the same as in the sultanate of Brunei because these states were part of the said sultanate in past. This law was *Shariah* based, inspired by Malay adat law, and it was also know as Malay Muslim law. This law was meant for Muslims. As far as the case of non-Muslims was concerned, the indigenous local people were subjected to the native customary law. Native law was recognized formally by Royal Charter of British Crown on November 1st, 1881, through article No. 9.

For a short duration, December 8, 1941- August 15, 1945, the Malay Peninsula remained under Japanese occupancy in the result of Japan's participation in world war II. Japan faced defeat in the war and the occupied areas were surrendered to the British at the end of the war. Eventually, British granted independence to this region in 1957.

1.3.2 Legal development in the Malay Peninsula

Law of this region had developed gradually in phases with the passage of time which can be divided into following phases:

a. Pre-historic period: The earlier inhabitants of the region were aborigines who used to follow their respective customary laws in day to day life. These customs and rituals are survived till now, to some extent. The aboriginal People Act of 1954 (revised in 1974) directs the commissioner of aborigine people to refrain from interfering in the business of head of aboriginal people while exercising his authority in the matters related with the native customs and beliefs.

b. Hindu-Buddhist impacts: For a long duration of one thousand year, the Malaya peninsula is ruled by Indians and left profound and pervasive influences as legacy, most of them are still in practice. The Hindu legal systems is consisted upon the instructions entered in *Dharma Sutra* (law books in prose), *Dharma Sastra* (law books in verse), their commentaries and customary laws. Hindu legal system covered matters relating with family, succession, property, contract, crime, procedure and evidence. However, the constitutional and criminal law influenced the region very deeply, being felt till today.

c. Islamization of the Malaya Peninsula: Around 1400 CE, Islamic Sultanate of Melaka was founded by sultan *Megat Iskander Shah*, formerly known as *Prameswara*, a refugee prince of *Palembang* (Indonesia). Malays used to follow two kinds of law which are customary in nature; *adat temenggung* and *adat perpatih*. The former was the branch of adat (customary) law based on patrilineal traditions and latter was based on matrilineal traditions. Comparatively, the former was harsh and autocratic than the latter. The Melaka Sultanate used to apply adat *temenggung* before advent of Islam. The arrival of Islam modified Malay adat law to bring it in accordance with instructions of *Shariah*. Resultantly, the Malay customary law with Hindu-Buddhist remnants was overlaid with *Shariah* injunctions.

d. Portuguese and Dutch Occupancy: Portuguese colonized Melaka in 1511 who formed *corpes de cidade* (a body which used to manage all matters with in Melaka walled city). This body used to exercise civil and criminal jurisdiction over Portuguese inhabitants however, Portuguese did not interfere in the matters of Asian communities

living outside the walled city who were subjected to *adat temenggung*. The imposition of Portuguese law over the population is in vague condition, yet. On the other hand, Dutch followed Portuguese in conquest of Malay soils and applied Dutch law upon Europeans, however, it is unclear whether they applied the same upon the natives or not?

Sir Benson Maxwell CJ (d. 1893), reports:

> The Portuguese while they held Malaysia and after them the Dutch, left the Malay customs or lex loci non scripta [the unwritten customary law] in force. That it was in force when this settlement was ceded to crown appears to be beyond the dispute and that cession left the law unaltered is equally plain on general principles.[51]

e. Introduction of English Law / Common Law: British forces arrived at Malaya Peninsula, first time, when they conquered Penang on August 12, 1786. As a general principle of common law, if a newly acquired territory is a *terra Nullius* (territory not previously owned or occupied), discovered and settled by British then English law will become law of such territory on the date of its settlement; provided that application will be subject to the extent it is applicable. Moreover, if the situation is vice versa; i.e. reacquired by British through cession or conquest, then the law previously exercised will be left in force until changed by the British.[52] Generally, Penang is considered a ceded territory, handed over by the Sultan of Kedah to British on May 1st, 1791 but for the reason of administration of *lex loci* (customary law), the judiciary regarded it as a settled area.[53]

Before the intervention of British, Malay adat law modified by *Shariah*, known as Muslim or Muhammadan law, was the practicing law of the region. Furthermore, the native states were in a running process of Islamization of customary law, which was checked by the intervention of British (Wilkinson, 1922).

The Malay [Muslims] were subjected to the Malay adat law in personal matters while non-Muslims were governed by their own respective customary laws except those who were British subjects as they were governed by English law. Malay states were not British territories, hence, as per principle of English law, the same could not be imposed upon them directly. British convinced the Sultans of these states to enact English law voluntarily through legislation. The Federated Malay states were pioneers in this regard who enacted English Civil Law through an enactment passed by Federal Council of these states in 1937. While, the Un-Federated Malay states formally adopted English law in 1951 when theses states were federated. Historically, the English law influenced Malay States right before the enactments of 1937 and 1957, respectively. British residents were appointed in Malay states under the treaties signed by British with the rulers of these states. In return to these treaties, the native rulers submitted to the appointment of British judges or British trained judges used to administer justice in accordance with the advice of British residents. A number of enactments were promulgated, modeled on Indian legislation which was based on English law such as the contract ordinance (Malay States) 1950 and Malay Penal Code were copied from Indian Contracts Act 1872 and Indian Penal Code 1860, respectively (Hamza, A First Look at the Malaysian Legal System, 2009, p. 126). Factually, influence of English law was not uniform on all states of Malaya. The FMS were inspired from English law in a great deal than UMS, because the

former was under mandatory advice of residents while the latter enjoyed flexibility in seeking advice, to some extent.

Constitutionally [54], after independence, each state of Malaysia is free to establish its own state Islamic courts to administer justice and resolve disputes under Islamic law. All states of federation have exercised a series of legal efforts for legislation and promulgation of Islamic law and have established an increasing number of regulations that binding on Muslims within their respective boundaries. The article 74 of constitution does not apply to the Federal Territories which are under the full control of the federal government. Federal Territories has developed its own body of Islamic law that govern the lives of Muslims living in Federal Territories and establish Islamic courts for administering justice (Shuaib, 2012, p. 91).

1.3.4 Organizations working for Islamization in Malaysia

The official religion of Malaysia is Islam under federal constitution. The Malaysian government have set organizations working for the facilitation of Islamization' s process. They are as under:

a. Islamic Development Department of Malaysia (JAKIM)[55]: Islam is the official religion as maintained in the Federal constitution in the 3 (1) that matter all which states "Islam is the religion of the Federation, other religions aim may be practiced in peace and harmony in any portion of the federation."

JAKIM began with the establishment of the National Council for Islamic Affairs , Malaysia (MKI)[56] in 1968 When its establishment was agreed by the Conference of Rulers. In 1974 , the secretariat of the MKI was upgraded to a religious division in the

Prime Minister's Department and was given the name of the Islamic Affairs Division (BAHEIS).[57] In line with the development of the country and the contemporary needs of the Muslim community, the Islamic Affairs Division (BAHEIS) has been restructured . On 2nd October 1996 , the Cabinet agreed with the recommendation that's BAHEIS of the status of the Prime Minister's Department be upgraded into a Department effective on 1st January 1997 with the name of the Department of Islamic Development Malaysia [JAKIM] (About Jakim, 2013).

JAKIM establishment is seen as one platform to meet the needs of the Muslim community in line with the development of the country that's photographs shown Islam as its official religion. The transformation carried out by JAKIM is in line with the vision , mission , motto , Objectives and Functions of this department as a leader in building a superior civilization for the community. To strengthen the management and produce a more efficient workforce , JAKIM is divided into four main sectors, namely; Policy Sector , Human Development Sector , Management Sector and Sector Under the Director General.

These formed sectors 22 divisions and all of them are under the auspices of JAKIM compared to just 14 divisions earlier part of the accomplishment of its establishment. Divisions in the Policy Sector are the Planning and Research Division , Islamic Development Division , Communication Division , Fatwa Management Division , Law Coordination Division.

The Divisions under the Human Development Sector is Divided into *Da'wah* Division , Human Development Division , Family, Social and Community Division ,

Publishing Division and Media Division (JAKIM, 2013).

There are three functions of JAKIM**,** which are as follow:

Function 1 : Legislation and Standardization of Islamic Law

Function 2 : Islamic Administration Coordination

Function 3 : Adjustment and the Development of Islamic Education

b. *Shariah* Judiciary Department Of Malaysia (JKSM) [58]: On July 3, 1996 the Cabinet agreed to the proposal to restructure *Shariah* Courts throughout Malaysia through the following measures:

1. To establish JKSM (Jabatan Kahakiman Syariah Malaysia) by the Federal Government headed by the Chief Justice of Malaysia's *Shariah*, who is also head of the open service officers scheme for *Shariah*.

2. To create an organizational structure JKSM.

3. To create four (04) posts of Judge of the *Shariah* Court of appeal to reconsider the appeals cases at the court of appeal in the states and Federal Territories.

4. To maintain the structure of the state *Shariah* Court of Federal Territories and that's, including the commissioning of the Chief Justice and *Shariah* officers.

5. To create a open service scheme for *Shariah* officer.

6. The Federal Government will bear the cost of *Shariah* officer.

Objectives of JKSM are as under*:*

- Establishing Islamic Laws relating to the administration of the uniform court for adoption in the states;

- Ensure that's all states use the open service *Shariah* officer of general federation;

- Ensure that's the cases handled by the *Shariah* Appeal Court fair, efficient and orderly;

- Facilitate the use of information technology systems to facilitate Islamic widespread judicial administration;

- Developing a resource center for use by public officials and related legal and judicial system of *Shariah* (JKSM, 2013);

c. Federal Territory Islamic Religious Council (MAIWP)[59] : Federal Territory Islamic Religious Council (religious council) was established on February 1, 1974 concurrent with the establishment of the Federal Territory of Kuala Lumpur. It was established for Islamic affairs in the Federal Territory of Kuala Lumpur before it was placed under the state government. Religious council is also a showroom for managing the affairs of the Muslims in Labuan and Putrajaya afterwards both was announced as the respective Federal Territory on 16 April 1984 and February 1, 2001. Establishment of the religious council was done through the Federal Constitution and the Administration of Islamic Law (Federal Territories) Act 1993 [Act 505]. Functions of Religious Council are as under:

- Provide adequate facilities for religious education to Muslims.

- Provide adequate places of worship for Muslims needs.

- Extensively, Raise the quality of services and religious welfare.
- Expanding Activities are include assisting the missionary activity missionary bodies and driving.
- Expansion and development of waqf lands.
- Improving zakat collection activities.
- Enforce all aspects of the administration of the law of Islam.
- Enhance economic Activities are in the fields of business, development and investment

d. Federal Territory Islamic Affairs Department (JAWI) [60] **:** Federal Territory Islamic Religious Department (Jabatan Agama Islam Wilaya Persekutan) initially established on February 1, 1974 to carry out MAIWP's instructions. It was formerly known as Council Secretariat. When the Ministry of Federal Territories (KWP) was established in 1978, JAWI were placed under the ministry. however, in 1987 the ministry was abolished. Thus, JAWI was placed under the administration of the Department of Islamic Development Malaysia (JAKIM) up to now (JAWI, 2013). In the early stages of its operation, JAWI was consisted upon small units, namely:

i. Administration
ii. Mosque Management Unit
iii. Enforcement Unit and prosecution
iv. Administration of marriage, divorce and ruju `
v. Zakat and treasury units
vi. Fatwa Unit

Since its inception, the JAWI never looked back order and continued to grow to this day with the existence of two branches, the Labuan branch was established on 16 April 1984 while Putrajaya branch was established on August 1, 2001. Now, the role of JAWI has-been extended to a number of areas including (JAWI, 2013):

i. Council asset planning and development
ii. Research
iii. Provide education and to fulfill needs of teachers for the education of Muslim children in the Federal Territories, particularly
iv. Conducting charitable activities
v. Making new civil management more constant
vi. Management of zakat, waqf and treasury
vii. Enforcement and prosecution and provide counseling to troubled couples
viii. Administration of family law in a more systematic manner
ix. Publish and distribute the magazine in connection with the activities of JAWI and religious books
x. Research fatwa

e. Institute Of Islamic Understanding Malaysia (IKIM)[61] : The Institute of Islamic Understanding Malaysia (Institut Kefahaman Islam Malaysia) was established on the 18th of February 1992 under the Companies Act of 1965 to promote a clear understanding of Islam through various programs and activities: such as seminars, workshops, consulting, training and through publications (IKIM, 2013).

IKIM was launched on the 3rd of July 1992 by Honorable Tun *Dr. Mahathir Mohamad*, Prime Minister of Malaysia.

Briefly, the activities of IKIM are as follows:

- To carry out intensive and integrated research activities which emphasize the role of Islam and the Ummah, and How they are to face the current challenges as a result of the changing role.
- To publish and issue newsletters, magazines, journals and books for public consumption and for specific target groups.
- To organizes conferences, forums, discussions, seminars and dialogues aimed at Enriching and encouraging intellectual discourse, and to assist in seeking solutions to prevailing issues.
- To co-operate with both local and international institutions and organisms in enclosed undertaking programs for mutual benefit.

1.4 Review of Authority of Government in Legislation

Determining the location of authority and its scope in law-making has remained a complex situation for the western philosophers since long. The jurists and political thinkers of the western world have been trying to find out rational and viable solution of this situation. As far as the case of Muslims is concerned, they are in the position to find solution of this situation as to where the authority dwells; enabling them to resolve many queries which seemed to be unanswered for the long time. It is important for the Muslims to comprehend the concept of Islamic institutions from the perspective of Islamic frame work and legal as well as constitutional history of Islamic history.

In this regard, determining the status of man in Islam holds prime significance. The Almighty Allah decided to create a vicegerent on the earth. The responsibility of the vicegerent was to represent his God and Creator in all His attributes and to fulfill His commandments as conveyed to him through revelations.[62] Verses of Holy Qur'an explain this status of man:

a. *It is He Who has made you vicegerents of the earth and has raised you in ranks, some above others, so that He may test you in the gifts He has given to you.*[63]

b. *We have destroyed generations before you when they did wrong, their messenger came with obvious signs, but did not believe. Thus we requite the criminals. Then We made you vicegerents in the earth after them to see how would you behave.*[64]

c. *It is He who has made you vicegerents in the earth, now if someone (rejects the assignment and) disbelieves, His disbelief will be against himself. The disbelief of disbelievers will not add the sight of their Lord except condemnation.*[65]

d. *Almighty Allah has promised to those among you who believe and work righteous deeds that He will surely grant them vicegerency in the earth as He has granted it to those before them and that He will surely establish them for their dīn, the one which He has chosen for them.*[66]

e. *They (Believers) are those who, if We establish them with authority in the earth, (they will certainly) establish regular prayer and give regular charity, bid the right and forbid the wrong.*[67]

In the above verses, vicegerency has been described for the whole body of believers, which proves that all members of *ummah* are vicegerents in their own individual rights. Therefore, no class of privileged with prerogative rights can emerge. The whole *ummah*, in its capacity of successor of the Prophet (SAW), is the holder God's authority to rule their land according to the guidance of God. This feature makes the Islamic state a republic in true sense and distinguishes it from other democratic system carrying drawbacks and shortcomings, being the brain child of human beings.

This position of vicegerency is exalted to the extent and the duties it entailed were so heavy the heavens, the earth and mountains declined to accept these great responsibilities as they were afraid of their incapability and inefficiency to comply with this great job.[68]

As man has described as vicegerent of Almighty Allah on the surface of the earth, therefore, Almighty Allah has granted certain scope of freedom to His faithful servants to exercise limited authority in order to perform the functions assigned to them. He has given a set of commandments containing the divine guidance for the purpose of observance by all human beings in their respective worldly life.

According to Holy Qur'an, the absolute right to rule, to decide and to judge, goes to Almighty Allah. Similarly, kingdom, ruler ship and emperor ship are His sole property, alone. No one is associated with Him in these feature, at all. This is evidently, repetitively and undeniably laid down in many verses of Holy Qur'an.[69] In the same manner, the study of Holy Qur'an reveals that Almighty Allah confers upon His special approval to execute the authority on His behalf. The Holy Prophets has to execute this authority in accordance with *Shariah* contained in divine revelation and guidance. The Holy *Qur'an* frequently refers to authority conferred upon His messengers form time to time; when a messenger passes away, the authority transfers to his followers, the community of believers as whole. Thus *ummah* of a Prophet assumes the responsibility as the legatee of divine mandate. The *ummah* as a whole cannot execute this authority, therefore it chooses a suitable individual for this distinguished job. This person represent the whole *ummah* and maintain the symbol of *ummah*'s collective authority.

1.4.1 The Scope of Legislation

Islamic law is basically a part of a holistic system based primarily on the divine message enclosed in the Holy Qur'an and traditions of the Prophet (SAW), which are the main fundamental sources of Islamic law. The principles described in Holy Qur'an and traditions of the Prophet (SAW) are guiding signs and limits within which human beings have to act and search for solutions. After the demise of the Prophet (SAW), provided a chance for the development of law with *Ijtehād*, which was already approved by the Prophet (SAW) in his life. The companions of the Prophet (SAW) developed the notion of *Ijmā* (اجماع) while early Muslim jurists discovered the *Qiyās* (قیاس), *Maslaha* (مصلحۃ), *Istislāh* (استصلاح), *Istehsān* (استحسان) etc. The development of Islamic law was carried out

by the highly skilled professionals but, most of them worked in private capacity, individually or sometimes, in collectively (Ghazi, 2006).

Whenever a new challenge arose, Muslim jurists and scholars used to start their efforts to discover certain rule of law in this situation while applying principles of *Ijtehād, Qiyās,*[70] *Ihstihsān*[71] and *Istislāh*[72]. They used to give their arguments in defence of their conclusions which may vary from one scholar to another. The judge or *Qāzī* was responsible to select the most sound and rational conclusion for applying on the specific situation. In the early days of Islam, where the judge was himself a recognized, established and trustworthy scholar, himself take part in the process of law making. This was the procedure through which the Islamic law developed and expanded, in a free atmosphere from the influence of rulers or government officials. No doubt, anyone having required knowledge and qualification, could participate in the process of law making, and his arguments were acceptable if based on sound authentic sources and rationale. It was in this manner that all major juristic schools appeared in the history of Islamic legislation.

It is an undeniable fact that process of legislation and development of jurisprudential caches remained in private sector. Sometimes, this process was patronized by the rulers and sometimes the scholar had to face their wrath but none of them submitted to the rulers' demands or wills.

Some rulers like *Haroon ur Rashid* [d. 809 AD] tried to convince *Imām Malik* [d. 179 H] to apply his master piece of work "*Mowatta*" in the courts of the Caliphate but *Imām Malik* refused to confine and restrict the fields of Islamic legislation providing opportunities for the jurists to continue their *Ijtehād* based efforts freely and

independently. The practice of whole of ummah remained on the same pattern for 1200 years after the *hijrah*. The first example of deviation from this pattern occurred in 1869 AD [1287 H] in Turkey when first ever codified piece of law known as *Majallah* was implemented in the courts of Ottoman Empire [1299-1922]. Actually, this was exodus from the tradition only in shape and manifestation and it was not a real exit in essence and spirit. However, it paved the way for a real deviation which the Muslim borne and then accepted under the tremendous pressure of western legal customs.

1.4.2 Role of Ruler in the Process of Legislation

As far as the legislation in the sense of law-making using the modes of *Qiyās* and *Ijtehād* is concerned, it is purely the field of competent scholars and the qualified jurists. However, in case there is a valid and genuine difference of opinion among jurists based on sound arguments, the head of state using his authority may direct the courts of state to follow one of such conflicting view under the domains of *Ijtehād, Masālih Mursala* and *Istehsān* etc. In such case the view preferred by authority will become law of the state and other juristic views will carry only academic value.

In case the head of state does not exercise this authority, it can be exercised by the judiciary. Therefore, if a competent court decides a case according to the view of a certain jurist, in matters related to the domain of *Ijtehād*, then the specific view will be considered as the law of this state. As a rule, the disagreement between jurists can be removed by the judgment of competent court. This is the way provided in the *Shariah* to annihilate the mutual disagreement which is inescapable. Therefore, if *Qāzī*, of whatever juristic school he may be, decides the case according to one of the views his decision

will be binding on all and the disagreement will be removed, and it will be considered as agreed law.

As far as the case of administrative orders for necessary management of the state's business is concerned, these orders should be within the boundaries of Siyasa Shariyya (administrative discretion of ruler according to *Shariah*).

The scope of rulers' authority can be confined in four categories:

a. Rulers can give suitable order to give legal effect the commandments and injunctions of the Qur'an and the Sunnah with proper consultation of Shu'ra (the consultative body). The role of Shu'ra is assisting the ruler through giving proper consultations, its function is not legislative rather it is deliberative and supervisory.

b. The ruler, with consultation of Shu'ra, can issue suitable orders under the principles of *Fath-e- Dhar'iāh* (فتح الذرائع) and *Sadd-e-Dhar'iāh* (سد الذرائع.) Literally, the word *dhar'iāh* means medium, instrument, means or device. *Dhar'iāh* include anything or action which becomes a means or serves as a source for the happening of another thing or leads to the commission of an act. Hence, the former term means opening the sources or allowing a certain action to reach at the another particular thing or action, while the latter term means vice versa. Applying this principle, the head of state or Shu'ra of state can issue administrative order either prohibiting a lawful action which has become a source for the commission of an prohibited act or the occurrence of an unlawful thing. Similarly, he can direct to do a certain act or adopt certain procedure,

though not mandatory in its original sense, which has become the only available source or means for the realization of an objective among objectives of *Shariah* or compliance of a commandment of *Shariah*.

c. The head of state can issue suitable administrative orders under the notion of *Daf-al-Darar* (دفع الضرر) or *Daf-al-Fasād* (دفع الفساد). Literally *Darar* (ضرر) means danger, harm, loss and injury and *Fasād* (فساد) means corruption, harm, decay, evil or scandalous action etc. It is one of the fundamental principle of the Islamic law that evil, harm or danger in whatever case and whatever degree and proportion may be, should be removed and eliminated as far as possible.

d. The head of state can issue orders concerned with the *Maslahāh* [مصلحة] (interest) or public weal, public good or public welfare. This principle explains that all actions and measures taken by head of state which have a binding force for the people in respect of their private and public rights must be based on the general good of community and its welfare. Hence, every action or measure taken by the rulers against this *Maslahāh* which may lead to monopolization, despotism and autocracy or which may cause *Darar* or *Fasād* shall be unlawful (Al-Zarqa, 1998).

1.4.3 Foundations of Legislation

The foundations of legislation in Islam are three, around which whole process of legislation revolves, they are as follow:

i. Protection of the objectives of *Shariah*
ii. Cause and Effect's notion
iii. *Ijtehād*

i. **Protection of the objectives of *Shariah*:** *Shariah* has high values intents for humanity and it ensures safeguarding the beliefs, lives and honors of people. Obviously, the objectives of *Shariah* are as under:

a. Protection of belief

b. Protection of life

c. Protection of property (wealth, belonging etc.)

d. Protection of procreation

e. Protection of Mind

(a). Protection of belief: Protection of belief underlines the significance of creed and doctrine for Muslim believers. It suggests armed resistance and defence when enemies of Islam intend to attacked Muslim and force them to change their creed. Similarly, the person who changes Islamic belief and adopts polytheism, he deserves to face certain punishments to save other Muslims from his effects and influence. Being a true an original and a divine religious it should not be a game of boys as hide and seek. Moreover, those people, who create a non-conductive environment for Muslims, those who mislead Muslims, and those who demonstrate disregard for the Prophet (SAW) or the other great emblems of Islam, can be punished/ sued under this articles for this purpose necessary legislation can be done from time to time as and when required.

(b). Protection of Life: The *Shariah* has stressed the protection of human life as one of most important obligations. The saving the soul of single human is credited as saving the souls of whole of humanity, similarly killing of single soul is amounted to the killing of whole of humanity. For making the souls and lives of the people safe and trusted, Islam has introduced punishments for the violators. Those who will kill someone

intentionally will be killed, resultantly. Moreover, other attempts of injuries will also be retaliated. *Shariah* provides guidance in this regard; however, necessary legislations or developments can be made with the changing world situations.

(c). Protection of Wealth (Property, belongings): Wealth, in shape of pennies, currency notes, gold or silver, assists in fulfilling a wide range of human requirements while, on the other hand, it creates issue and problems, since time immemorial *Shariah* provides guidance and direction about earning as well as spending of money. Those who transgress and cross the border liner are subject to specific punishments for which necessary legislations can be opted as per procedure laid down in the *Shariah*.

(d). Protection of Procreation/ Lineage: Preservation of lineage is included in the important objective and intents of *Shariah*. It has directed in this regard Muslim believer either male or females, should not establish unfair and illegal conjugal relations between them. *Shariah* has provided comprehensive guidance and teachings for making the relationships of husband and wife pure, sincere and sympathetic.

(e). Protection of Mind: Sound mind is a fabulous gift from God which distinguish human from other creatures. Human had given the vice regency on the earth and for this purpose the sound mind and thought were required.

All the commandments of *Shariah* are concerned with those who have sound mind and sense. For this reason, mad, unsound and mentally handicapped persons are exempted from *Shariah* obligations. The *Shariah* underlined the development of mind and thought and preservation of it from of all such substances effecting smooth function of mind.

ii. Notion of Cause and Effect: Cause (*illa't*) is defined as a reflected and designated virtue on which a specified result or effect (*Hukum*) has been established, and

attached to it through presence or absence it is desired for acquiring high interests of *Shariah*. On the other hand, another term *Sabab* (cause) is defined as by which the existence of a specific think exists but not by its authority. It has been elaborated in more detail by *Bazdawi*:

> *In the Shariah, Sabab means a way to something: whoever follows the way reaches the destination. He obtains it through that way, not by the way he followed. Just as one who travels along the road to a city, reaches it through that road and not by merely it but by travelling on it.*
>
> *As for "ill'at" it means in the Shariah that to which the obligation of a command is attributed primarily such as the contract of scale is the ill'at of ownership, marriage is the ill'at of having sexual intercourse with female partner and homicide is the illat of retaliation, and similar others* (Al-Bazdawi, 1974).

How distinction can be made between these two terms? So, the Muslim jurists have used both terms of *ill'at* and *sabab* as interchangeable to one another generally. However, some jurists have pointed out features which distinguish between the two. Moreover, some jurists are of the opinion that there is the relation of general and particular between *ill'at* and *sabab*. Thus every *illat* is *sabab* but every *sabab* is not as *ill'at*.

According to first opinion, both are equal to one another can and be used interchangeably. AS per opinion of second school if the suitability and interest of the cause for the command is intelligible, it is known as *illat*, such as journey is the cause of breaking fast, intoxication is the cause of prohibition of wine and minority is the cause of

guardianship. But if interest of the cause of a specific command is not intelligible, it is named as *sabab* such as the month of Ramadan is the cause of fasting and sunset is the cause of obligation of evening prayer.

The intent or interest of these two causes in favour of their respective commands is not realizable. It is worth mentioning here that difference between the two is minor and can be neglected as *illat* is the effective and direct cause of a commandment while *Sabab* is otherwise. Their distinction depends upon the extent of the intelligibility of the reason or wisdom underlying therein (Zaidan, 1967).

Relation between cause and effect: The correlation between cause and effect is very firm and binding as the cause exists, the effect of that cause is produced. For example, kinship is the cause of getting share in the inheritance of a deceased when the cause will exists, the heir will get his due share in the inheritance as the effect of the cause provided that there is no impediment in this regard. The impediment or obstacle is explained as cover between cause and effect which is restraining the two from producing result. For instance, in the above example, the impediments may be killing the deceased by an heir or existence of a nearer heir will deprive the further one from inheritance. Therefore, these impediments are taking into consideration before acting upon the effect of the cause.

It is noteworthy that the legal effect takes place as a result of its cause by the commandment of lawgiver without the assent or dissent of the *mukallaf*. The lawgiver has appointed the cause to produce their effects, disregarding the assent or dissent of the *mukallaf*. A son will inherit his father definitely, for son ship is inheritance. The assent or dissent of father or son or both will not be taken into consideration. Similarly, if a man

marries a woman on a condition that the wife will not be provided with the dower, maintenance and inheritance the wife will be given her full rights as they are the effects of marriage laid down by the law giver. A husband cannot nullify the effects of a valid marriage as per his wish.

Cause (*illat* علت) is defined as a reflected and designed virtue on which a specified result or effect (*Hukum* حکم) has been established and attached to it through presence or absence because it is desired for acquiring high interest of *Shariah* (Zaidan, 1967).

On the other hand, another term *Sabab* (cause) is defined as by which the existence of a specific think exists but not by its authority.

It has been elaborated in more detail by *Baidawi*: In the *Shariah*, *Sabab*)سبب(means a way to something: whoever follows the way, reaches the destination. He obtains it through that way, not by the way he followed. Just as one who travels along the road to a city, reaches it through that road and not by merely it but by travelling on it.

As for "*illat*" it means in the *Shariah* that to which the obligation of a command is attributed primarily such as the contract of scale is the *illat* of ownership, marriage is the *illat* of having sexual

iii. ***Ijtehād :*** Literally the term *Ijtehād* means exploiting of one's efforts in a work with utmost dedication (Ibn-e-Manzoor, 1995). In the terminology of *Shariah*, *Ijtehād* is an organized and dedicated effort for seeking the solution of new issues in the light of pre-determined guidelines of *Shariah*. It is the capacity of law making deductions in matter of law in case to which no express text or a rule already determined by *Ijma* is applicable.

More obviously, *Ijtehād* means the application of faculties by a competent jurist to the consideration of the authorities of law Quran, traditions of Prophet (SAW) and *Ijma*, with the view to find out what probability of the law is, that is in such matter which is not covered by the express words of such text and has not been determined by *Ijma*.

Muslims jurist explained the term *Ijtehād* very clearly from various aspects which determines that indulging in *Ijtehād* is not the business of everyone but it is the name of such committed effort carried out by a competent person having certain qualifications in the light of *Shariah* sources (*Qur'an* and *Sunnah*) in order to reach to the solution of a newly faced situation. The most famous tradition of the *Maaz bin Jabal* (RA). He was appointed as *Qāzī* of Yemen by the Prophet (SAW), and then he was asked by Prophet (SAW): How you will decide when a case will come before you? With the Book of Almighty Allah, he replied. The Prophet (SAW) asked if you do not find that within it. With the Sunnah of Prophet (SAW), he answered. The Prophet again asked; if you do not find it in the Sunnah? He replied; I will do my best using my reason and opinion and will leave no stone unturned in finding the solution. The Prophet (SAW) felt happy upon this and prayed for him by thanking Almighty Allah for granting strength to the messenger of His Prophet to which is commendable (Sajistani, 2006).

The scholars and jurists of *Shariah* have commented since the time immemorial that *Ijtehād* is an evergreen process and it will remain continue in each and every age to solve the situational based issues related with every age in the light of *Shariah* commandments.

It is an undeniable fact Islamic teachings and guideline are forever and they are limited. With growing population and development, new issued and situations arise which need solutions, also. The religion of Islam provides their solution very proudly through its flexible process of *Ijtehād*.

Therefore, *Ijtehād* is an important component of legislation in any Islamic governments. For carrying on the activities of *Ijtehād*, there can be three kinds of organizations:

a. Organizations working under the auspices of government. E.g. Federal *Shariah* Court and Council of Islamic Ideology are two organizations of such type in Pakistan.

b. Organizations working under the auspices of International Organization e.g. International Islamic Fiqh Academy is working under the Organization of Islamic Cooperation (OIC).

c. Organizations working in private capacity e.eg. Fiqh Academy of India.

The prominent and important principles for the purpose of legislation under *Shariah* injunctions, are as under:

I. Confinement/Restriction of *Shariah* Guidelines to the Legislation: The main objective of *Shariah*'s commandments is to regulate the all aspects of human life and individual's personality. This is why the core sources *Shariah* consist of the guidelines and instructions which cover all actions of a human.

The distinguish between a state, in which legislation is based on *Shariah* and a state, in which legislation is not based on *Shariah*, is that the former one legislate a specific law based on principles of *Shariah* and this law has not the capacity of a brand new law rather it has been derived from the preset selected sources of *Shariah*. While, the latter one legislates a new law, which is not derived from preset sources, most often.

The particular *Shariah* principles control the field of legislation and it is not free and open to every Jack, Tom and Harry. Therefore, the Islamic state has no authority to legislate against the punishments of heinous crimes such as murder, theft and robbery etc. Similarly, the *Shariah* has not narrated all commandments related with social life of wife and husband, keeping relations with neighbor countries, dealing with minorities living with in state and those who have sought asylum or took refuge etc. Rather it has elaborated the limits of every command and appointed such principles which cover the requirements of present situations as well as newly emerged ones. The first principle of legislation within Islamic country is that Islamic state is not absolutely free to legislate a piece of law according to her wishes but it has to ponder in sources of *Shariah* and derive the new commands from these sources.

II. Obligation of Obeying the *Shariah* for the Head of State: The instructions of *Shariah* direct the general public to obey the head of state in letter and spirits and do not go astray except the case where the head of state goes against the guidelines of *Shariah*.

It has been narrated on the authority of Ibn-e-Umar (RA) that the Holy Prophet (SAW) said:

"*It is obligatory upon a Muslim that he should listen (to the ruler appointed over him) and obey him whether he likes it or not, except that he is ordered to do a sinful thing. If he is ordered to do a sinful act, a Muslim should neither listen to him nor should he obey his orders*" (Al-Qasheeri, 1996).

Therefore, the head of state is advised to bind himself to the principles of *Shariah* while legislating and issuing administrative orders in the state. His adherence to *Shariah* will make the public to follow his orders as a God's imposed duty otherwise they the right to reject such orders which are not in accordance with *Shariah*. This situation can lead to the such type of government known as autocracy and dictatorship etc. which Islam does not support, principally.

III. Confining the Legislation Required for the Smooth Running of State's Business: Legislation is done for the solution of issues or situations related with the actions of mankind, and it proves the authority of a specific command as mandatory, obligatory, important, commendable, optional undesirable, prohibited and nullified etc. The role of the head of state in this regard is to facilitate the these actions through the procedure of *Ijtehād* endorsed by *Shariah*. This can be done in the areas of penal code's punishments where the head of state enjoys the right to increase or decrease the quantity of such punishment. However, this feature requires a great deal of insight, wisdom and ability of judging the psychological condition of the culprit. Similarly, the head of state has no right to intervene in such situations in which Muslim jurist have been differed and related with the faith, doctrine and creed of the masses. The matters which can cause

inconvenience or disturbance, are out of his authority, also. Principally, the head of state does not intervene in the transactions and worships which carry diversity of Muslim jurists within them, in order to curb disturbance and disarray among Muslims (Khalidi, 1980). However, such matters are excepted form this principle which are necessary for the welfare and interest of public e.g. collection of zakat and announcement of moon of *Ramdhan* and *Eid*.

IV. Restricting the Procedural Law to the Specific Fields: Procedural law is the mean to implement a particular order, rule or regulation for ensuring the establishment of wide spectrum *Shariah* law through acting upon or refraining the people from it as the case deem good in public's interest, provided that it should not against the preset instructions of *Shariah*. While looking for such *Shariah* laws which requires procedural law strategy for effective implementation, they can be of two types:

a. Establishment of those obligations which are known as *Farz-e- Kifaya* i.e. collectively obligated on Muslims (it means that if a group of people do an obligated job or fulfill a responsibility, the liability of whole of Muslim *ummah* is fulfilled e.g. offering prayer on a deceased person).

b. Organization of such activities which are required for the welfare and betterment of general public such as;

i. Prohibiting those actions or things which lead to harmful or unlawful results. This notion is based upon the tradition of Prophet (SAW): الضرر وال ضرار

" *There should be neither harming nor reciprocating harm*" (Ibn-e-Maja, 2002).

ii. Organizing the rules and procedure for the protection of general public and state for smooth functioning and facilitation e.g. mines, rivers, meadows, forests, roads, designing of traffic plan and rules etc. This notion is supported by the act of *Hazrat Umar* (RA) when he restricted some meadows of state for government horses used in fighting (*jihad*), and that time a large number from Prophet' s companions were witnessing this (Ibn-e-Atheer, 2012). It proves making of necessary laws in organizing the state and public's property.

iii. Necessary procedural, administrative and penal laws can be made for the Organization of state's business in a smooth way e.g. organization of army on a specified manner and introduction of ranks within it, forbidding collectors of *zakat* and government dues from accepting gifts and presents from general public etc.

V. Consultation with the Experts from Muslim Ummah and State's Accountability Bureau: The teaching of *Shariah* underline the adoption of proper course of consultation in every important situation generally, and in legislation, especially. The Holy Qur'an directs in this regard; وَشَاوِرْهُمْ فِي الْأَمْرِ

and (O' Prophet) consult them (Muslims) in the affair" (03:159).

Hazrat Umar (RA), similarly, issued a great ruling regarding the lands of *khirāj* [73] with the consultation of Prophet's companions (Abu Yousuf, 2010).

Therefore, consultation is required to investigate and search all aspects of the law for ensuring minimum flaw within it.

VI. Preference to *Qazā Al-Sharī* over the right of State's Head for legislation:

Islam guarantees the supremacy of judiciary over the state's head whenever he goes astray against the guidelines of *Shariah*. The Holy Qur'an instructs the believers;

> " *O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result* (04:59).

The referring to God and His Apostle, means to present the situation upon the Book of God and Sunnah of His Prophet (SAW). This supremacy protects the state form autocracy, dictatorship and exploiting the right of legislation (Al-Wakeel, 1990).

1.5 Utilization of Combination of Islamic Juristic Schools

Originally, juristic schools of thoughts had been come into existence in the result of variety of opinions in the companions of Prophet Muhammad (SAW). Differences in transmitting the sayings and actions of Prophet Muhammad (SAW) were existed from very beginning, which brought positive effects over the thinking abilities and rationality of Muslims.

The main factor for creation of these difference was the gradual obligation of Islamic instructions on people, which is psychologically a natural approach. Some companions who witnessed Prophet's action and listened to His sayings in the beginning of Prophet's era, transmitted what they witnessed and listened to the people of their localities after returning from visit of Medina. Similarly, those who got opportunity of meeting with Prophet during middle or last phase of His life, witnessed particular actions different from what was practiced in the past. Those companions transmitted such actions or sayings to their tribesmen. Hence difference of opinions was created. For example, talking was allowed during offering prayers in the beginning, which was prohibited later on. Drinking of alcohol was permitted but afterwards the permission was cancelled in a gradual process. There is large number of instances which prevail in the Muslim *ummah* like causes of annulment of *wudū* (ablution), condition of *Wali* (guardian) in marriage contract, reading of *surah Fatiha* behind *Imām* and movement of hands in during prayers while shifting to particular positions (*Raf ul Yadain*).

As the juristic differences had been appeared in the beginning of Islam, therefore, a rule was unanimously agreed that each juristic opinion based on *Ijtehād* would be open

for further discussion for rectification and soundness and instead of that it would be implemented.

During the second century after *hijrah*, the field of Islamic Jurisprudence widened and developed rapidly. The most important perspective of this development and appearance of various schools was that the different schools were inter-related and linked to one another. In other words, a certain school did not appeared in isolation free from the influence and effects of other juristic schools, rather they benefitted from each other in association and discussion. It also shows that jurists avoided rivalry and boosted cooperation and mutual understanding. *Imām Abu Hanfia* (d.150 H) belonged to Kufa, but when he visited the Holy city of *Makkah*, he spent six years there in learning the Islamic knowledge form the students of *Abdullah bin Masood* (RA), a renowned companion of Prophet (SAW) having mastery in Jurisprudence. *Abdullah bin Masood* (RA) was considered as chief of *Hijazī* school of thought. *Imām Malik bin Anas* (d.179 H), the founder of *Malikī* school, used to live in Medina. He used to share his juristic opinions with those scholars who called on the mausoleum of Prophet (SAW), situated in the same city. *Imām Muhammad bin Idrees Al-Shafī* (d.204 H) educated from *Imām Muhammad bin Hassan Al-Shaibani* (d.189 H) and *Qāzī Abu Yousaf* (d.182 H), the students of *Abu Hanifa*. Similarly, *Imām Ahmad bin Hanbal* (d.241 H) was the student of *Imām Shafī*. In that age, it was mandatory for the scholar to know about other schools, their opinions and justifications (Shatibi, 1997).

It merits mentioning here that there are two attitudes about issues related with *Ijtehād*:

I. the first school is of the view that each and every opinion of a *mujtahid* is accurate and to the point.

II. the second school views that accurate opinion is single, basically. However, its final appointment has not been decided among various opinion of jurists.

Based on these two attitudes, the Muslim jurists of early age thought that their opinion is correct and accurate to the best of their knowledge, insight and comprehension, however, there is possibility of more refinement through some other jurist's opinion. Resultantly, it was principally agreed that whosoever acted upon the opinion and *Ijtehād* of a certain jurist or mujtahid, that would be implementable and acceptable.

Generally, the Muslim *ummah* and especially the Muslim scholars were of the opinion, in early times of Islam, that differences or variety in views based on *Ijtehād* are a kind of blessing for Muslims. Hence, variety in views was a mean of bringing easiness and comfort to general public in acting upon the commandments of *Shariah*.

Moreover, the jurists agreed on another principle that if a certain man faces trouble to comply with a certain opinion of a particular *mujtahid*, the he could act upon the opinion of some other jurist. As far as the role of state or authority was concerned, the jurists unanimously agreed upon the principle that court's decision and state's order obliterates the difference in opinions and implements under the *Shariah* injunctions, accordingly. The incident which took place during the campaign of *Banū Quraiza*[74] support his standpoint. The Prophet (SAW) directed a group of his companions to reach to the territory of *Banū Quraiza* and offer the prayer of "*Asr*)عصر(" there. However, the

time of said prayer reached in the mid of the way before arriving at destination. The Prophet's companions divided into two groups; one was of the opinion to delay the prayer and act upon the directive of Prophet until arriving to the destination while the second viewed that to offer the prayer in the way as the Prophet's directive implicates fast movement towards *Banu Quraiza*. When Prophet Muhammad SAW came to know about this incident, he did not rebuke any one of these two groups (Ismail, 1373 H). In other words, He validated the decision of the both.

This tradition of Prophet (SAW) provides an opportunity for pondering and deriving various possible solutions for a specific command, which is not explained by Holy Qur'an or Sunnah. The action of *Hazrat Umar* (RA) further supports this idea. A man reported to *Hazrat Umar* (RA) that *Hazrat Ali* and *Hazrat Zaid bin Thabit* (RA) made certain decision in a case. *Hazrat Umar* (RA) responded that if I were they, I would have decided it another way. The reporting man asked to change this decision as head of state but *Hazrat Umar* (RA) replied that he could have change this if the said case was related to Qur'an and Sunnah but the decision is based on opinion and *Ijtehād*, and we all are equal in this regard (Barr, 2002).

In another case, *Hazrat Umar* (RA) issued a ruling in a case related with inheritance. A man sitting in court objected that a different ruling was issued in the similar case in a certain year, previously. *Hazrat Umar* (RA) replied that what he had decided in past and what has decided at present, both are accurate and implementable (Abu Ishaq, 2008).

According to *Ibn-ul-Qayyim* (d. 751 H), *Hazrat Umar* (RA) took the previous opinion for issuing ruling which seemed accurate to him and the former ruling did not hinder in referring to the *Ijtehād* in latter one. At the same time, the latter ruling did not annul the former one, and that was the practice of Muslim jurists, afterwards (Ibn-e-Qayyim, 2003). It means that the former ruling was not as correct as the latter one but being based on *Ijtehād* the both were remained on their positions.

Qasim bin Muhammad (d. 108 H) a renowned scholar of *Medina* in early phase of Islam, used to say that Almighty Allah blessed this *ummah* with juristic differences among Prophet's companions. Anyone of the followers from general Muslims, who will follow a certain companion, will be sure that he has followed a personality better than him (Usmani, 1999). With the spread of Islam in various corners of world, new situations used to emerge, which demanded solutions as per Islamic injunctions, this trend lead to utilize the tool of *ijtehād* on large scale. Resultantly, many juristic schools of thoughts emerged providing solutions for a specific case. It is a fact that most of the times jurists differed in presenting solution besides that each derived his solution from basic sources of Islam. The reason for this difference, is the comprehension of a specific *Naṣ* (command) and methodology of derivation. Similarly, in the present age, new challenges have been emerged due to speedy technological development, demanding solutions according to Islamic instructions.

Different juristic schools adopt diverse approaches for searching the solution of a specific challenge. Sometimes a certain juristic school strictly negates the opinion of other school, ignoring the practice of the founders of the juristic schools, who used to discuss different situations without imposing their opinion on other. Diversity in time and

place, may alter a certain injunction partly or wholly. This approach has been exercised in the past, and it is the need of hour to accommodate other's opinion admitting existence of differences of opinion in jurists without considering a certain opinion as final and accurate. Ignoring the opinion of other will result in stagnancy in thinking ability of Muslims.

An important perspective is the establishment linkage, mutual co-operation and understanding among various juristic school, presently. The swift change in day to day life demands that Muslim jurists should have sufficient knowledge of different schools of thought. This tendency will foster *Ijtehād* based approach in Muslim jurists. Amazingly, the present tremendous technological development in communication ways has made it easy to benefit from one another.

In this connection, a Syrian scholar suggested in 1953 that total clauses of different schools of thought should be re-arranged in single document and opinion of each school should be given an optional status enabling the *Qāzī* or judge to issue decision keeping in view the circumstances, time, place and social challenges.

Therefore, considering assorted opinions of jurists and getting benefits from them, is the need of the present age to face the challenges of modern world. No doubt, it is a great job and it will need highly skilled scholars having expertise in multi-juristic schools information as this job have many slips to avoid derailing from the straight path. Some important consideration is doing the said job are as under:

I. This job should not lead to a result which is prohibited or nullified against Islamic injunctions or contrary to the consensus (*Ijmā'*) among *ulema* (scholars).

II. This job should not result in ending the a *Shariah* granted concession or

III. This attempt should not be against the wisdom based knowledge and interests of administrative authority.

IV. The attempt must not be searching for concessions/leaves or following the personal desires.

V. The job should not be contrary to the administrative authority's orders and commands.

End Notes:

[1] Law is defined as a body of rules of conduct of binding legal force and effect, prescribed, recognized, and enforced by controlling authority. While the branch of law dealing with marriage, divorce, adoption, child custody, support and other domestic- relations issues. [It is] also termed domestic relations; domestic-relations law (Bryan, A.G, Back Law Dictionary, St. Paul, Minn, 1999, 17th Ed, p.621).

[2] This act was promulgated on March 21st, 1890 and this act deals with the matters of guardian ship and wards (Farani, 2011, p. 709).

[3] It was promulgated on October 1st, 1929 in the Indian sub- continent and legalized the age for groom and bride as eighteen years and sixteen years respectively (Farani, 2011, p. 118).

[4] N-W.F.P [North-west frontier province] Muslim Personal Law (Shariat) Application Act, 1935 was enacted on December 5, 1935 in the province of N-W.F.P [now Khyber Pakhtunkhwa] after getting provincial autonomy in the same year. This act provided solutions to the issues of succession, special property of females, bastardy, wills, legacies, guardianship, dower, divorce etc. in the cases where parties are Muslims (Farani, 2011, p. 939).

[5]The Muslim Personal Law (Shariat) Application Act, 1937 came into force on October 7, 1937. The act was applicable to the all areas which are now part of Pakistan excluding N-W.F.P which had enforced the same kind of act in 1935. According to this act, the personal matters of Muslims will be decided in the light of Shariat instead of customary law (Farani, 2011, p. 950).

[6] The Dissolution of Muslim Marriages Act, 1939 was enacted on March 17, 1939. This act provides grounds for a Muslim woman to seek dissolution of her marriage as per Islamic principles (Farani, 2011, p. 123).

[7] Customary law is such type of law which has been devised from old traditions and conventional usages to which people are devotedly adhered and followed by them through centuries (Farani, 2001, p. 926).

[8] For further study please see:

(i). Qureshi, Ishtiaq Hussain 1969, The Struggle for Pakistan, University of Karachi Pakistan, 2nd

(ii). Saqib, Ehsanullah, 1997, History of Indo-Pakistan since 1526, Dogar Brothers, Lahore, 6th

(iii). Shahab, Rafiqullah 1988, History of Pakistan, Sang-e- Meel Publications, Lahore,1st

(iv). Jalalzai,Musa Khan, 1993, History of Indo- Pak, Prince Book Depot, Lahore, 1st

(v). K. Ali, 1989, A New History of Indo-Pak up to 1526, A-One Publishers, Lahore, 4th

[9] East India Company was granted a Royal Charter by Queen Elizabeth [September 7, 1533-March 24, 1603] in 1600 C.E. Shares of the Company were owned by wealthy merchants and aristocrats. The government owned no shares and had only indirect control. The Company eventually came to rule large areas of India with its own private armies, exercising military power and assuming administrative functions. The Company was dissolved in 1874 as a result of the East India Stock Dividend Redemption Act passed one year earlier, as the Government of India Act had by then rendered it vestigial, powerless and obsolete. Its functions had been fully absorbed into the official government machinery of British India and its private Presidency armies had been nationalized by the British Crown. (http://en.wikipedia.org/wiki/East_India_Company retrieved May 15, 2012).

[10] Parliament of Great Britain enacted a regulatory act in 1773 in which governor general was made bound to the approval of council consisted of four members appointed by British crown it was called governor general council (*http://en.wikipedia.org/wiki/East_India_Company#Founding* retrieved May 17, 2012).

[11] *Dharma Shastra* is one of the standard books in the Hindu canon, and a basic text for all gurus to base their teachings on. This 'revealed scripture' comprises 2684 verses, divided into twelve chapters presenting the norms of domestic, social, and religious life in India (500 BC) under the Brahmin influence, and is fundamental to the understanding of ancient Indian society (http://hinduism.about.com/od/scripturesepics/a/laws_of_manu.htm retrieved May 17, 2012).

[12] For example: *Gobind Dayal* vs *Amir Muhammad* (1885), *Jafri Begam vs Amir Muhammad* (1885) 7 All 822

For further study please see; A. Hussain (1935) *Muslim Law as Administered in British India,* Calcutta, pp. 45-52

[13] In 1877, Sayyed Amir Ali CAH founded the National Muhammadan Association in Calcutta, which branches had been started in other cities of India also(E.J. Brill's First Encyclopaedia of Islam 1913-1936, p. 483)

[14] According to section 6 of Indian independence act 1947; In the case of each of the new Dominions, the powers of the Legislature of the Dominion shall, for the purpose of making provision as to the constitution of the Dominion, be to of exercisable in the first instance by the Constituent Assembly of that Dominion, and references in this Act to the Legislature of the Dominion shall be construed accordingly.

[15] Among these controversies are; issue of national language; whether it should be Urdu or Bengli or both?, whether the state should be secular or Islamic one?, whether the system should be presidential or parliamentary?, Whether the parliament should be bicameral or unicameral?, How the powers will be divided between center and provinces and Election will be held separately or combined? etc.

[16] President Ayub Khan remained in office from 1958 AD to 1969 AD

[17]Muhammad Ali Bogra (1909-1963) was the third Prime Minister of Pakistan. He remained in the office of Prime Minister from April 17, 1953 to August 12, 1956.

[18] APWA was established by Begum Raana Liaqat Ali Khan, the wife of Mr. Liaqat Ali Khan who was the first prime minister of Pakistan, on February 22, 1949 in Karachi. The goal of establishing this organization was the welfare of women in moral, Social and economic sectors. APWA has affiliation with a number of international organizations (www. *http://apwapakistan.com//about-us/history* retrieved May 17, 2012).

[19] Begum Salma Tassaduq Hussain (1908-1995) was a political, social and educational activist. She elected as member of Punjab Assembly in 1946 for first time. She became the member of Punjab Assembly again in 1954 and presented the family Laws bill. She remained the vice president of all Pakistatan women association and honored with a number of gold medals and cerificates in reconition of her services (*www.paknetmag.blogspot.com/2009/08/pioneers-of-freedom-series-1997-9.html* retrieved June 19, 2012).

[20] Shah Muhammad Jaffar Pholwari was a religious scholar. He served as research fellow at the institute of Islamic Culture Lahore. He wrote many books and articles to highlight the solutions of modern issues in the light of Islamic teachings.

[21] *Idara Saqafat Islamiyya* Lahore was established by the Government of Punjab in order to facilitate the Islamization process in the province, soon after the establishment of Pakistan.

[22] Dr. Khalifa Shuja-ud-Din (1887-1955) remained the speaker of Punjab Assembly from 07-05-1951 to 14-10-1955 (*http://www.pap.gov.pk/html/formerspeakers_e.shtml retrieved June 20*, 2012). He was a lawyer, politician, social activist. He worked as Hon. Professor Islamiya College, Lahore, 1906-08; Member, General Council *Anjuman-i-Himayat-i-Islam*, Lahore, 1906-09, 1913-28; Elementary Education Committee Anjuman-i-Himayat-i-Islam, 1914-20; Punjab Text Book Committee, 1919-25; Secretary Punjab Muslim League, 1919-36; Member, Syndicate, University of the Punjab, 1921; Academic Council, University of Punjab, 1923; Council, AIML, 1923-45; Executive Board, All India Muslim Conference; Advisory Committee NW Railway 1929-30; Secretary, *Anjuman-i-Himayat-i-Islam*, Lahore 1947-55; Lahore High Court Bar Association, 1947-50; Speaker, Punjab Assembly, 1951; member, Pakistan Law Commission, 1950; President, Government Commission for Women Rights, 1955 (*http://www.allamaiqbal.com/publications/journals/review/oct01/04.htm#_edn12* retrieved June 20, 2012).

[23] Dr. Khalifa Abdul Hakim (1896 – 1959) was a prominent thinker, philosopher and poet. He received his degree of doctorate from Heidelberg University, Germany (http://www.khalifaabdulhakim.com retrieved 15-1-2012).

[24] Maulana Ihtesham ul Haq Thanvi (1915-1980): a prominent religious scholar of Pakistan and founder principal of Jamia Ihteshamia, Jacob line, Karachi, he was born at the town of Thana Bon (Uttar Pradesh, India), educated at darul uloom Deoband (Uttar Pradesh, India) and migrated to Pakistan in 1948 after the partition of Indian sub-continent. He used to recite and explain the verses of Holy Qur'an on Radio Pakistan being gifted with a melodious voice. He was in his entourage to Indian city of Madras for participation in a seerat conference, where he passed away due to cardiac arrest (Retrieved from http://ur.wikipedia.org, on Feb 08, 2013)

[25] Begum Jahan Ara Shahnawaz (1896 – 1979) was a political activist. She was born at Lahore and got education from Queen Mary College Lahore. She was the daughter of Sir Muhammad Shafi and married to Sir Mian Muhammad Shahnawaz. She remained the member of the first constituent assembly of Pakistan

from 1947 to 1954 (Shahnwaz, Jahan Ara 1971, Father & Daughter: A Political Autobiography, Nigarshat, Lahore p. 185).

[26] Begum Anwar G. Ahmad was born in a noble family of Amritsar (India) in 1916. She was married to Mr. G. Ahmad Ex-Director General Planning Board, Government of Pakistan. She represented Pakistan in UN commission on status of women from 1953 to 1959. She was activist of women wing of Muslim League in Pakistan's movement and played active role as founder member in All Pakistan Women Association, APWA (Sultana, 2009 p.456).

[27]Begum Shams U Nihar Mehmood (1908 -1964) was the member of the commission from the then East Pakistan. She got early education at Chittagong (Bangladesh), passed matriculation examination in 1926 and graduated from Calcutta (India). She was married to Dr. W. Mahmood Deputy Civil Surgeon East Bengal. She served as lecturer at Calcutta College. She represented Muslim women of Bengal in international women conference in 1939 apart from remaining busy in political activities under the flag of Muslim league (Sultana, 2009, p. 238). She remained member of the National Assembly of Pakistan from 1962 to 1965 on reserved seats (Library of National Assembly of Pakistan Records, http://www.wpcp.org.pk/wpcp/SecondPhase.aspx retrieved May 17, 2012).

[28] Enayat ur Rehman was a retired session judge and belonged to East Pakistan (Pakistan, 1956, p. 1195).

[29]Justice Abdul Rashid was the first Chief Justice of Supreme Court of Pakistan. He remained in office from June 27, 1949 to June 29, 1954 (Supreme Court Annual Report 2003, p. 133).

[30] "A body consisting of the chairman and representative of each of the parties [husband & wife] to a matter dealt with in this [MFLO 1961] ordinance provided that where any party fails to nominate a representative with in prescribed time, the body formed without such representative shall be the Arbitration Council" (Farani, 2011, p.21).

[31]The term of limited estates is not explained in the said act, however, in legal circles it is equivalent to limited interests. Tybji (1949) has defined the term limited interest as "Limited interests may be defined quite simply as rights short of full ownership, held or acquired by a person either gratuitously or for a return. The limitation may be exercised over the property concerned, or a limitation on the duration of such

rights. A particular transaction my, of course, have both these limitations at the same time" (Tybji, Kamila 1949,*Treatise on Limited Interests in Muhammadan Law*, University of Michigan, 1st Ed, p. 27).

[32] Legatee also known as beneficiary person named in will to receive property (*www.lectlaw.com/def/1021.htm* retrieved June 20, 2012).

[33]This act was published in the "Punjab Gazette" on 28thMay 1920. The act reads: "An Act to amend and consolidate the law governing the limitation of suits relating to alienations of ancestral immovable property and appointments of heirs by persons who follow custom in the Punjab". (*http://punjabrevenue.nic.in/cust87.htm retrieved June 19,2012*)

[34] This act was first published in the "Punjab Gazette" on May 28, 1920. The act reads as: "An Act to restrict the power of descendants or collaterals to contest an alienation of immovable property or the appointment of an heir on the ground that such alienation or appointment is contrary to custom". http://punjabrevenue.nic.in/cust88.htm retrieved June 19, 2012

[35] The NWFP Muslim Personal Law (Shariat) Application Act, 1935 was enacted on 1935. It regulated the cases of personal law to be decided according to Islamic teachings where parties are Muslims (Farani, 2011, p. 939)

[36] The Muslim Personal Law (Shariat) Application Act, 1937 in its application to West Pakistan

[37] The Punjab Muslim Law (Shariat) Application Act, 1948

[38] The Muslim Personal Law (Shariat) Application (Sindh Amendment) Act, 1951

[39] The Bahawalpur State Shariat (Muslim Personal Law) Application Act, 1950

[40] The Khairpur State Muslim Female Inheritance (Removal of Customs) Act, 1952

[41]The Punjab Custom (Power to Contest) Act, 1920 [This Act received the consent of Lieutenant-Governor of the Punjab on the 6th April, 1920 and 1st Published in the Punjab Gazette of the May 28, 1920. This act aimed to restrict the power of descendants or collaterals to contest an alienation of immovable property or the appointment of an heir on the ground that such alienation or appointment is contrary to custom, *http://www.lawsofindia.org/pdf/haryana/1920/1920HR2.pdf* retrieved September 30, 2012] was repealed by section 7(2) of the Muslim Personal Law Shariat Application Act, 1962. The said section was omitted by

The Punjab/Sindh/NWFP/Baluchistan Muslim Personal Law (Shariat) Application (Amendment) Ordinance, 1963.

[42]This section was already amended by the Punjab/Sindh/NWFP/Baluchistan Muslim Personal Law (Shariat) Application (Amendment) Ordinance, 1963 as the provincial assembly of Punjab was not in session. Later on, this amendment got the consent of Provincial Assembly of West Pakistan as Act XXVIII of 1964. It was published then Gazette of West Pakistan, Extra Ordinary, 15th April 1964 (Farani, 2011, p.938).

[43] Siyasa Shariyya means; the right of the executive branch of the (Muslim) government to complete the *Shariah* by regulations of an administrative kind. [Pearl, D., A Textbook on Muslim Law (London: Croom Helm Ltd., 1979), p. 20]

[44] Funan is the Chinese name of an ancient kingdom located around the Mekong Delta of southern Vietnam and in southern Indonesia.

[45] Cambodia, officially known as the Kingdom of Cambodia and once known as the Khmer Empire, is a country located in the southern portion of the Indochina Peninsula in Southeast Asia. It was bordered by Thailand to the northwest, Laos to the northeast, Vietnam to the east and the Gulf of Thailand to the southwest (http://en.wikipedia.org/wiki/Cambodia, Retrieved on January 26. 2013)

[46] The kingdom of Champa was a Hindu kingdom that controlled what is today central Vietnam from approximately the 7th century through to 1832, before being conquered and annexed by the Vietnamese people. The kingdom was known variously as *nagara Campa* (http://en.wikipedia.org/wiki/Champa, Retrieved on January 26. 2013)

[47] Sri vijaya was a powerful ancient thalassocratic Malay empire based on the island of Sumatra, modern day Indonesia, which influenced much of Southeast Asia (http://en.wikipedia.org/wiki/Sri vijaya, Retrieved on January 26. 2013)

[48] Majapahit was a vast thalassocratic archipelagic empire based on the island of Java (modern-day Indonesia) from 1293 to around 1500 (http://en.wikipedia.org/wiki/Majapahit, Retrieved on January 26. 2013)

[49] Pasai, also known as Samudera Pasai and Samudera Darussalam was a Muslim harbour kingdom on north coast of Sumatra from 13th to 15th century CE (en.wikipedia.org, retrieved January 26, 2013)

[50] Chulas and Anor v Kolson (1867) Leic 462, 462-463

[51] Campbell v Hall 1 Cowp. 204) [(1877) Leic SLR 466,469]

[52] Calvin's case (1608) 77 ER 377, Campbell V Hall (1774) 98 ER 1045

[53] Fatima v Logan (1871) 98 ER 1045

[54] Article 74, Schedule 9, List II (states list) item No. 1

[55] Jabatan Kemajuan Islam Malaysia (JAKIM)

[56] Majlis Kebangsaan Hal Ehwal Islam (MKI)

[57] Bahagian Hal Ehwal Islam (BAHEIS)

[58] Jabatan Kahakiman Syariah Malaysia (JKSM)

[59] Majlis Agama Islam Wilayah Persekutuan (MAIWP)

[60] Jabatan Agama Islam Wilaya Persekutan (JAWI)

[61] Institut Kefahaman Islam Malaysia (IKIM)

[62] Quran (02:30-39)

[63] Quran (06:165)

[64] Quran (10:13-14)

[65] Quran (35:39)

[66] Quran (24:55)

[67] Quran (22:41)

[68] Quran (33:72-73)

[69] Quran (06:57, 06:62, 12:40, 12:62, 28:70, 28:78, 03:189, 05:17-18, 17:111, 25:02, 35:13, 67:01)

[70] *Qiyās* is a method that uses analogy and comparison to derive Islamic legal rulings for new developments. *Qiyās* can be defined as taking an established ruling from Islamic law and applying it to a new box, in virtue of the fact that the new box shares the same essential reason for all which the original ruling was applied (http://en.islamtoday.net/artshow-385-3387.htm retrieved on January 30,2013).

[71] *Istehsān* is an Arabic term for juristic "preference". In its literal sense it means "to Consider Something good". Muslim Scholars may use it to express preference for a particular judgments are solely for in Islamic law over other possibilities. It is one of the underlying principles of personal legal Interpretation thought or reason (http://en.wikipedia.org/wiki/Istihsan retrieved on January 30,2013).

[72] *Istislāh* is a method employed by Muslim jurists to solve problems that find no clear answer in sacred religious texts. It is related to the term مصلحة Maslaha, or "public interest (http://en.wikipedia.org/wiki/Istislah retrieved on January 30,2013).

[73] It is "tax" imposed by the Imam of the Muslims on the productive lands of Foreign countries. There are two kinds of such land; firstly, the land which Muslims have gained thorough reconciliation, and the people enter into an agreement with Muslims for paying a specific amount each year. This land belongs to their masters, and they have the right to sell, mortgage and donate this land. If the masters of land embrace Islam, they will be exempted from paying this tax. Secondly, the lands which are conquered by Muslims forcibly with power will not be divided between fighters but will remain in the custody of their master in the exchange a tax will be collected from them every year. If the masters of such land embrace Islam or the land transfer to Muslims, the tax will be collected in addition to the " *'ushar* " [The zakat of crops is with the ratio of 1/10] (http://fatwa.islamweb.net/fatwa/index.php?page=showfatwa&Option=FatwaId&Id=6032 retrieved Jan 23, 2013)

[74] Banū Quraiza was a Jewish tribe lived in Madina (formerly Yathrab) till 7th century AC. It is attribute to the Quraiza bin Nammam (http://ar.wikipedia.org/wiki/بنوقريظة retrieved on January 23, 2013)

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Chapter 2

Registration of Marriage

2.1 Process of Registration of Marriages in Pakistan, Rules and Punishment in Case of Contravention

Before going to discuss the topic of registration of marriages, it seems pertinent to elaborate the both terms and legal status of it in *Shariah* for effective comprehension of the topic. Generally, the phrase "Registration" means recording the statements of parties involved in a deal at authorized government office. It has been defined as:

"*underwriting the marriage contract under the supervision of a judge as an empowered authority for marriage contracts or any delegated authority by the judge for the purpose documentation and authentication of marriage contracts"* (Ashqar, 2001, p. 93).

On the other hand, marriage is denoted by "Z*iwāj*" or "*Nikāh"* in Arabic which literally means "getting to gather" or "joining". Marriage or *ziwāj* can be defined as a contract which has for its object the procreation and the legalizing of children. A legal marriage in Islam can be defined as "a marriage contracted and solemnized in accordance with Shariah with all its constituents and condition and without any legal impediment" (Islamlaws, 2012).

According to Black Law Dictionary, marriage is:

"the legal union between a man and a woman as husband and wife. Although, in common law regarded marriage as a civil tract, it is more properly the civil status as relationship existing between a man and a woman who agree to live to gather as spouses. The essentials of a valid marriage are:

(a). Parties legally capable of contracting marriage,

(b). Mutual consent or agreement, and an actual contracting in the form of prescribed law" (Garner, 1999).

As per *Hanafī* school of thought, the contract of marriage can take place using all those words who lead to intention of marriage, and, according to *Malikī and Hanbalī* schools of thoughts, marriage can only take place using two words i.e. *Ziwāj* (زواج) *and Nikāh* (نکاح) , and with the words, which are derived from the root of these two words. *Shafī* school of thought says that it can be done with the words structured from *Tazweej* (زتوجی) *and Nikāh*, and it is unlawful to use other words instead of them. *Imamiyya (Itna Ashri*) are of the opinion that marriage can be legalized only with words 'زوجت'(I got married) or 'انکحت' (I gave in *Nikāh* i.e. marriage) and these words must be used in past tense (Mughnia, 1964).

There is no specific rule or procedure before the commencement of Marriage in Pakistan to inform authorized registration office. According to Article 5 (1) of the

Muslim Family Laws Ordinance 1961, every marriage solemnized under Muslim Law shall be registered in accordance with the provisions of this Ordinance. For the purpose of registration of marriage under the section 5(2) of this Ordinance, the union council shall grant licenses to one or more persons, to be called *Nikāh* Registrars, but in no case shall more than on *Nikāh* Registrar be licensed for any one ward. According to subsection 3 of section 5, if the marriage is solemnized by someone else other than the *Nikāh* Registrar appointed under this ordinance for purpose of registration of marriages, he shall have to report to the *Nikāh* Registrar for registration of such marriage. Section 5 (4) of ordinance provides punishment for those who contravene the subsection 3 of the ordinance. It suggests the punishment of simple imprisonment for a term of which may extend to three months or with fine which may extend to one thousand rupees, or with both.

The section 5 (5) provides the information about the *Nikāhnama* and its preservation as record. The subsection states that the form of *Nikāhnama*, the registers to be maintained by *Nikāh* Registrars, the records to be preserved by Union Councils, the manner in which marriages shall be registered and copies of *Nikāhnama* shall be supplied to the parties and the fees to be charged thereof, shall be such as may be prescribed.

As per section 5 (6) of the ordinance, any person may inspect the record preserved in the Union Council or obtain a copy any entry therein under the subsection (5) on payment of prescribed fee (Manan, 1995, p. 3).

Rules were made regarding the registration of marriage in the ordinance titled as West Pakistan Rules under the Muslim Family Laws Ordinance 1961 by the Governor of

West Pakistan and published in Gazette of West Pakistan, extra ordinary, on 20th July, 1961. Under the rule 7(1) any person competent to solemnize a marriage under the Muslim Law may apply to Union Council for the grant of a license to act as *Nikāh* Register under the section 5 of Muslim Family Laws Ordinance 1961. The subsection 2 of section 7 provides that Union Council, after making such enquiries as it may consider necessary, is satisfied that the applicant is fit and proper person for the grant of license, it may, subject to conditions specified therein, grant a license to him in form I. [1] The subsection (3) narrates that the license granted under the this rule shall be permanent and shall be revocable only for the contravention of any of the conditions [2] of a license granted under this rule.

According to rule 10 (1) the *Nikāh* Registrar shall, in case the marriage is solemnized by him, fill in Form II, [3] in quadruplicate in the register, the persons, whose signatures are required in the Form shall then sign, and the *Nikāh* Registrar shall then affix his signature and seal thereto, and keep the original intact in the register. The rule 10(2) states that the duplicate and triplicate of the *Nikāhnama* filled in as aforesaid shall be supplied to the bride and the bridegroom, respectively, on payment of fifty paisa each, and the quadruplicate shall be forwarded to the Union Council. The rule 10 (3) illustrates that if any person required by this rule to sign the register refuses so to sign, he shall be punishable with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

Rule 11 (1) provides that where a marriage is solemnized in Pakistan by a person other than the Marriage Registrar, such person shall fill in Form II, to be had loose on

payment of such price as may be determined by the Provincial Government, the persons whose signatures are required in the form shall then sign, and the person solemnizing the marriage shall then affix his signatures to the Form and ensure delivery, as expeditiously as possible, of the same together with the registration fee to the Marriage Registrar of the ward where the marriage is solemnized. Rule 11 (2) provides that if any person required by this rule to sign the Form refuses so to sign, he shall be punishable with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees , or with both.

The rule 12 states procedure for the marriages solemnized outside Pakistan. The sub-rule (1) provides that in case of a marriage solemnized outside Pakistan by a person who is a citizen of Pakistan, such person shall person ensure delivery of Form II, filled in, in accordance with the Provisions of rule 11, together with the registration fee, to the consular officer of Pakistan in or for the country in which marriage is solemnized, for onward transmission o the Marriage Registrar of the ward of the bride which is permanent resident and in case the bride is not a citizen of Pakistan, the marriage Registrar of the ward of the bridegroom which the bridegroom is such resident. Sub rule (2) provides that in case of a marriage solemnized outside Pakistan by a person who is not a citizen of Pakistan, the bridegroom and where only bride is such citizen, the bride, shall for purpose of filling in, as far may be, Form II, be deemed to be the person who has solemnized the marriage under sub-rule (1).

The sub rule (3) provides that on receipt of Form II under rule 11 or rule 12, the Registrar of Marriages shall proceed in the manner provided in rule 10 as if the marriage solemnized by him:

Provided that, except where marriage has been solemnized within his jurisdiction, it shall not be necessary for the Marriage Registrar to obtain the signature of the necessary persons.

2.2 Process of Registration of Marriage, Rules and Punishments in Case of Contravention in Malaysia

Section 13 of Act 303 states that a marriage shall not be recognized and shall not be registered under this Act unless both parties to the marriage have consented thereto, and either;

(a) the *wali*[4] of the woman has consented thereto in accordance with Hukum Syarak[5]; or

(b) the Syariah Judge having jurisdiction in the place where the woman resides or any person generally or specially authorized in that behalf by the Syariah Judge has, after due inquiry in the presence of all parties concerned, granted his consent thereto as *wali Raja* in accordance with Hukum Syarak; such consent may be given wherever there is no *wali* by *nasab*[6] in accordance with Hukum Syarak available to act or if the *wali* cannot be found or where the *wali* refuses his consent without sufficient reason.

According to Section 7 (1) of Act 303: A marriage in the Federal Territory shall be in accordance with the provisions of this Act and shall be solemnized in accordance with Hukum Syarak by

(a) The *wali* in the presence of the Registrar;

(b) The representative of the *wali* in the presence and with the

permission of the Registrar; or

(c) The Registrar as the representative of the *wali*.

(2) Where a marriage involves a woman who has no *wali* from *nasab* (نسب) in accordance with Hukum Syarak, the marriage shall be solemnized only by the *wali Raja*.[7]

According to Article 16 (1) of the Act 303, whenever it is desired to solemnize a marriage in the Federal Territory, each of the parties to the intended marriage shall apply in the prescribed form for permission to marry to the Registrar for the *kariah masjid* [8] in which the woman is resident (Malaysia, 2006, p. 18).

As per Article 16(3), the application of each party must be delivered to the Registrar at least seven days before the proposed date of marriage, but the Registrar may allow shorter period in any particular case (Malaysia, 2006, p. 18).

As specified in Section 17, subject to the section 18 [9], the Registrar, on being satisfied of the truth of the matters stated in the application, of the legality of the intended marriage, and, where the man is already married, that the permission required by section 23 [10] has been granted, shall, at any time after the application and upon the payment of prescribed fee, issue to the applicants his permission to marry in the prescribed form.

As per section 25 of Act 303, the marriage after the appointed date of every person resident in the Federal Territory and of every person living abroad who is resident in the Federal Territory shall be registered in accordance with this Act.

According to section 26 (1) of the Act 303, upon registering any marriage and upon payment to him of the prescribed fees, the Registrar shall issue marriage certificates in the prescribed form to both parties to the marriage.

The section 27 of the Act 303 provides that It shall be the duty of every person to report to the Registrar the circumstances of any case it appears to him that any alleged marriage was void or that any registrable marriage was solemnized in contravention of this Act.

According to section 28 (1) The Yang di-Pertuan Agong [11] may appoint any qualified public officer to be the Chief Registrar of Muslim Marriages, Divorces, and *Ruju*' for the purposes of this Act, who shall have general supervision and control over Registrars and the registration of marriages, divorces, and *ruju'* [12] under this Act.

(2) The Yang di-Pertuan Agong may appoint so many qualified persons as may be necessary, to be Senior Registrars, Registrars, or Assistant Registrars of Muslim Marriages, Divorces, and Ruju' for such *kariah masjid* in the Federal Territories as may be specified in the appointments.

(3) The Yang di-Pertuan Agong may, by notification in the *Gazette*, appoint any member of the diplomatic staff of Malaysia in any country to be the Registrar of Muslim Marriages, Divorces, and Ruju' for the purposes of this Act in that country.

The section 29 states the mode of preservation of the marriage documents. It provides that every Registrar shall keep a Marriage Register and such books as are prescribed by this Act or rules made under this Act, and every marriage solemnized in the Federal Territory shall be duly registered by the Registrar in his Marriage Register.

The section 30 illustrates the submission of copies to Chief Registrar. Its subsection (1) provides that every Registrar shall, as soon as practicable effective the end of each month, deliver to the Chief Registrar a true copy certified under his hand of every entry made in the Marriage Register. The next subsection (2) states that all such copies shall be kept by the Chief Registrar in such manner as may be prescribed and shall constitute the Marriage Register of the Chief Registrar.

The section 31 defines the procedure for the marriages abroad and outside Malaysia. According to subsection (1) where any person who is a resident of the Federal Territory has contracted a valid marriage according to Hukum Syarak abroad , not being a marriage registered under section 24 , the person shall, within six months after the date of the marriage , appear, before the nearest or most conveniently available Registrar of Muslim Marriages , Divorces , and *Ruju* abroad in order to register the marriage , and the marriage , upon being registered , shall be deemed to be registered under this Act.
The subsection (2) states that where , before the expiry of the period of six months , the return of either or both parties to the Federal Territory is contemplated and the marriage has not been abroad registered ,registration of the marriage shall be effected within six months of the first arrival of either or both of the parties in the Federal Territory by the party or both parties appearing before any Registrar in the Federal Territory and:

(a) producing to the Registrar the certificate of marriage or such evidence, oral or documentary either, as the place that may satisfy the marriage did take place;

(b) such particulars as furnishing may be required by the Registrar for the due registration of the marriage , and

(c) applying in the prescribed form for the registration of the marriage and subscribing the declaration therein.

As per subsection (3) the Registrar may dispense with the appearance of one of the parties if he is satisfied that there exists good and sufficient reason for the absence of the party and in that case the entry in the Marriage Register shall include a statement of the reason for the absence .

The subsection (4) provides that upon the registration of a marriage under this section , a certified copy of the entry in the Marriage Register signed by the Registrar shall be delivered or sent to the husband and another copy to the wife , and another certified copy shall be sent , within such period as may be prescribed , to the Chief Registrar who shall cause all such certified copies to be bound together to constitute the Foreign Muslim Marriages Register.

(5) Where the parties to a marriage required to be registered under this section have not appeared before a place within the period specified in subsection (1) , the marriage may, upon application to the registrar, be registered later on payment of such penalty as may be prescribed. The section 32 suggests penalty for who unlawfully solemnizes a marriage or pretends to act as Registrar. It provides that no person other than a Registrar appointed under this Act shall:

(a) keep any book that is or purports to be a register kept in accordance with this Act, or

(b) issue to any person any document that is or purports to be a copy of a certificate of a marriage or a certificate of marriage registered by the Registrar.

The section 34 of the Act provides that merely registration of marriage does not possess the authority to validate or invalidate a marriage. It illustrates that nothing in this act or rules made under this act shall be construed to render valid or invalid any wedding otherwise that is invalid or valid, merely by reason of its having been or not having been registered.

2.2.1 Findings

Generally, the marriage registration procedure of Malaysia is more comprehensive, organized and modernized as compared to procedure of registration laid down in Pakistan. It can be comprehended from the following points:

- There is no system of informing and getting consent of concerned registration authorities in advance in Pakistan while it is incumbent upon the wedding parties to inform the registration office at least one week before the proposed day of marriage.
- Malaysia has developed a systemized approach towards registration of Marriage by establishing a specific sub department for the registration of marriages, divorce and *ruju* (revocation of divorce) in Federal Territories Islamic Affairs Department (JAWI) named as Branch of Marriage, Divorce and *Ruju*. The main functions of the branch is as under:

    1. Ensuring marriage, divorce and re-cohabitation made in accordance with the Islamic Family Law (Federal Territories) Act 1984 (Act 303).
    2. Provide Effective services to the community in matters of marriage, divorce and re-cohabitation in Federal Territories.
    3. Responsible for the supervision and monitoring of the production and registration of marriage certificate, divorce re-cohabitation in Federal Territories.

4. Provide advice and guidance to the public related to the question of the law and procedure of marriage, and divorce registration re-cohabitation in Federal Territories.
5. Become a coordinator for the activities carried out by the unit
6. Prepare an annual report of activities and Registration Unit Marriage, Divorce and *Ruju*.
7. Manage the appointment of the Chief Registrar, Senior Registrar, Registrar and Assistant Registrar of Marriage, Divorce and *Ruju* for Muslims in Federal Territories (http://www.jawi.gov.my).

After going through the registration process of both countries, it is revealed that, as a whole, Malaysian system for registration of marriages is better than the system followed in Pakistan. A proper supervision system has been evolved for the registration of marriages, divorce and *ruju* by appointment of Registrars and Chief Registrar while there is no such system of supervision over the *Nikāh* Registrar in Pakistan. *Nikāh* Registrar writes down entries in the *Nikāh* register and provides its copy in the union council concerned while there is no check upon him to ensure correct entries.

A marriage cannot be solemnized by any man other than the Registrar and it is an offence as per section 36 of Act 303 in Malaysia punishable with the fine not exceeding one thousand ringgit or imprisonment not exceeding six months or with both while a man other than *Nikāh* Registrar can solemnize a marriage in Pakistan but he has to report to the *Nikāh* Registrar (Malaysia, 2006, p. 27).

A marriage can be registered even after its solemnization in Pakistan while

in Malaysia it is banned. Every marriage is solemnized and registered together at same time.

The marriages solemnized outside Malaysia (in foreign countries) have been given the grace period of six months to appear in nearby consulate or embassy of Malaysia for the registration of Marriages while for Pakistani marriages in abroad, have not been provided with any time frame. Rather the wedding Pakistani bridegroom will report to consular officer who will submit Form II to the *Nikāh* Registrar of the ward where the bride permanently resides.

The Registrar of marriage, divorce and *ruju* has the authority to make necessary corrections in the documents as per specified procedure while there is no correction procedure in Pakistan to correct the marriage documents. The entries made by the *Nikāh* registrar are considered final. Therefore, a proper mechanism should be introduced for the correction of entries in the *Nikāhnama* even after the marriage has been taken place.

Any man who pretends to be a Registrar and keeps registers for the purpose of registration is also punishable in Malaysia with a fine not exceeding one thousand ringgit or imprisonment not exceeding three month or both. On the other hand such kind of law is missing in Pakistan.

2.2.1.2 Recommendations:

1. It is recommended that proper chain of officials for registration of marriages and divorce should be introduced in Pakistan to keep check on the subordinate officials and ensuring smooth running of affairs as well as protection of documents. In this connection, it is suggested on the basis of the current comparative study, Senior Registrar and Chief Registrar of *Nikāh* and Divorce should be introduced. The Senior Registrar will supervise a district and Chief Registrar will oversee the Division. The *Nikāh* Registrar will report to Senior Registrar and Senior Registrar will report to Chief Registrar. At the level of province, there should be a Provincial Chief Registrar, who will supervise and guide the whole province in order to ensure correct and in time entries in marriage documents.
2. It is also recommended that *Nikāh* Registrar himself should be authorized for the solemnization of marriages in concerned locality rather than inviting another person for the solemnization e.g. *Imām* or *Khateeb* of the locality.
3. The registration of post solemnized marriages should be discouraged and a fine should be imposed on such cases. Every marriage should be registered at the time of its solemnization.
4. The standard *Nikāhnama* requires furnishing correct information at one side and its recording on the other one. Properly maintained and utilized *Nikāhnama* can be extremely valuable in establishing the fact of marriage

and defining its terms and conditions. Therefore, it is recommended that *Nikāh* registrars should be adequately educated and properly trained to perform their responsibilities more effectively.

5. It is recommended that there should be a specific limit of religious and secular education to qualify for the licence of *Nikāh* Registrar. It would be more better if a special diploma course be developed for the qualification of a *Nikāh* registrar providing them detailed information about their specific job.
6. The *Nikāh* Registrar should be aware of the fact that his major responsibility is the protect the rights of both wedding parties especially of oppressed women, therefore, he should verify all information before recording in the document of registration.
7. Keeping in view the current technological development, it is suggested that record of marriage and divorce should be computerized and biometric technology should be used for recording the statements of the wedding of couple. This process will help in ending the problem of forced marriages.
8. At the time of promulgation of Muslim Family Laws Ordinance 1961, the Basic Democracy system was prevalent in the country. The local bodies system within Pakistan has been changed more than one time and Basic Democracy system has been abolished. This abolition brought great setback for the implementation of MFLO. Therefore it is recommended that necessary amendment should be introduced in MFLO 1961 through legislation for the effective implementation.

9. Jurisdictions of the Union Council should be notified after revision of constituencies to ensure facilitate general public and cope with the problem of increase in population.
10. There is dire need to implement an effective system for the registration and record keeping of Muslim marriages. It is necessary that all functionaries of the Union administration be adequately trained to correctly and diligently register marriages and perform ancillary duties of record keeping. These processes should be transparent and the procedure should be such that it makes interpolation or changing of entries impossible.
11. Column 5 of the *Nikāhnama* should be amended with addition of following:

    If the bride is divorced or widow, how many children she begets from her previous husband?
12. In column 21 of *Nikāhnama*, the following sub column should be added:

    Whether the bridegroom is divorcee or widower, if yes, then how many children he begets from his previous marriages?

13. It is recommended that expertise of National Database and Registration Authority, Government of Pakistan, should be utilized in the registration process of marriages and divorce. The wedding couple should be issued cards as proof of their marriage, with all necessary information, for quick and easy reference (the sample card which is issued in Malaysia, is attached as Annex- D).

2.2.2 Legal Status of Registration of Marriages in Shariah Perspective

While searching for the legal status of registering a marriage, no specific verse of the Holy Quran or tradition of the Holy Prophet (SAW), which directly describes the legality or illegality, could be found. Similar is the case of jurisprudential literature because the Muslim scholars of the past did not regard the registration of marriage by government official as mandatory condition. This statement is firmly, established by the fact that, it was never recognized in Islamic jurisprudence any literature to create a role for an administer in administering a marriage contract. Historically, the documentation of marriage contracts could be found when people started postponing the payment of dower (*mahr*) and writing down that on the paper to serve as authentication as and when needed. A prominent scholar *Ibn-e-Taymiyya*[13] [d. 1328 AD) argued as the companions of the Prophet (SAW) did not contract marriages on postponed dowries therefore, they did not used to write down the dowries to serve as authentic proof. But when people started marriages on postponed dowries for a long term which might lead to forgetting it, the documentation of dowries was introduced in order to avoid disputes and differences in future (Ibn-e-Taymiyya, 1386 H, p. 188). However, its legal position can proved through indirect sources. For example:

a. According to the verse 282 of *Surah Baqarah*, the writing down of the deed of taking/giving loan is termed as a desirable act. The verse says:

ذِ لاا يّ ه َي اف نمالّيِ نُتا ا لد ع ا بب

أ ا ا جا أ َل نيِ د ب يد ا ا ا ي بب ك ل

ت لي لوا ه بوت كا فىم سّ ام ل ت ا لك ا

O you who believe, when you transact a debt payable at a specified time, put it in writing, and let a scribe write it between you with fairness.

The verse further says:

And do not be weary of writing it down, along with its due date, no matter whether the debt is small or large. That is more equitable in Allah's sight, and more supportive as evidence, and more likely to make you free of doubt. However, if it is a spot transaction you are effecting between yourselves, there is no sin on you, should you not write it. Have witnesses when you transact a sale. Neither a scribe should be made to suffer ,nor a witness. If you do (something harmful to them), it is certainly a sin on your part, and fear Allah. Allah educates you, and Allah is All-Knowing in respect of everything (02:282).

If the dower is not paid at time of marriage, then it becomes debt over the husband and the wife can demand it any time. In case of dispute between them, the

written documents will reinforce the liability over the husband along with the statements of witnesses of the marriage. Similarly, the issues of parenthood, guardianship, divorce, dissolution of marriage and maintenance etc. can be solved easily.

b. Under the notion of *Maslahā Mursalāh* or *Istislāh*, [14] the authority or the scholars of Islam can recommend such laws or regulations which are not against the principles of

Islam and which can be useful for public and assist in regulating the administrative matters of government (Bin Baz, 2012).

The case of registration of marriages, if seen from this perspective, it comes clear that registration of marriages can bring good results in the long run through providing the authentic document for the settlement of various issues concerned with family matters.

c. *Siyasa Shariyya* [15] (the Administrative Authority) has been accepted as a valid justification for a certain command in a specific situation. It is argued that Holy Quran has commanded to obey God, His messenger and the people given authority over them. The Holy Quran says:

ذِين ال ّ ي أ يا أ م نُوا أ طِيعُوا ال ّ ر و أ طِيعُوا ال ّ
أ طِيعُوا ل ٱ سُو و أُولِي ال أ م ر مِن
كُم

"O you, who believe, obey Allah and obey the Messenger and those in authority among you. (04: 59)

The best example of it is the commandment of second caliph Umar, in which he forbade his governors to marry Christian women. Although, it was termed permissible by the Holy Qur'an (05:05):

م ن ال م ح ص ن ات م ن ال ذ ين أ وت وا ال ك ت اب م ن ق ب ل ك م
و ال م ح ص ن ات م ن
ال م ؤ م ن ات

And [lawful in marriage are] chaste women from among the believers

and chaste women from among those who were given the Scripture

before you, when you have given them their due compensation [05:05].

Hazrat Umar (RA) disliked and restricted marrying the Christian women to save Muslims and their children from the hazards of the future (Al-Baihaqi, 2007).

From the above discussion it becomes quite clear that registration of marriage is an administrative matter and the authority can enforce such rules and regulation which can facilitate smooth running of government affairs and ensure safeguarding of public welfare.

Endnotes:

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[1] The form I is attached as annexure B

[2] These conditions are stated in Form I, which are as under:

i. This license is not transferable

ii. This license is revocable for breach of any of the provisions of the Muslim Family Laws Ordinance 1961 (VIII of 1961) or the rules made there under or any condition of this license.

iii. The registers and seal supplied to the Nikah Registrar shall be returnable to the Union Council/Union Committee/Town Committee without refund of cost, when this license expires or is revoked.

iv. The Nikah Registrar shall not put the seal supplied to him to any improper use.

v. Such conditions, if any as may be specified by the Provincial Government (Manan,1995, p. 14).

[3] The form II is attached as annexure C

[4] Wali means the person who has relation of *nasab* and has authority to marry a woman as per Shariah teachings (Act 303:2006, p.13).

[5] Hukum Syarak" means Islamic Law according to any recognized Mazhab (Act 303, 2006, p.11).

[6] "*Nasab* means descent based on lawful blood relationship, (Act 303, 2006, p.12)

[7] "*Wali Raja*" means a wali authorized by the Yang di-Pertuan Agong, in the case of the Federal Territories, Malacca, Penang, Sabah and Sarawak, or by the Ruler, in the case of any other States, to give away in marriage a woman who has no *wali* from *nasab*; (Act 303, 2006, p.13)

[8] *Kariah masjid"* in relation to a mosque, means the area, the boundaries of which are determined under section 75 of the Administration Act [i.e. The Majlis may at any time by notification in the Gazette determine, amend, or alter the boundaries of any kariah masjid (Administration of Islamic Law: 2010, p. 109)].

[9] Section 18 says: (1). In any of the following cases, that is to say-

a. Where either of the parties to the intended marriage is below the age specified in section 8 [which states the age of bridegroom as eighteen years and as bride sixteen years, (Act 303, 2006 p.14)]. or

b. Where the woman is a *janda* [a woman who has been married and divorced after consummation, (Act 303,2006, p. 11)] to whom subsection 14(3) [this sub section describes: If the woman alleges she was divorced before the marriage had consummated, she shall not, during the ordinary period of *iddah* for a divorce, be married to any person other than her previous husband, except with the permission of Shariah judge having jurisdiction in the place where she resides, (Act 303, 2006 p.17)] applies; or

c. Where the woman has no *wali* from *nasab,* according to Hukum Syarak (Shariah)

[10] This section deals with the issue of polygamy and describes procedure for getting permission for marrying more than one wife. The act says:

(1) No man, during the subsistence of a marriage, shall, except with the prior permission in writing of the Court, contract another marriage with another woman nor shall such marriage contracted without such permission be registered under this Act:
Provided that the Court may if it is shown that such marriage is valid according to Hukum Syarak order it to be registered subject to section 123.

(2) Subsection (1) applies to the marriage in the Federal Territory of a man who is resident within or outside the Federal Territory and to the marriage outside the Federal Territory of a man resident in the Federal Territory.

(3) An application for permission shall be submitted to the Court in the prescribed manner and shall be accompanied by a declaration stating the grounds on which the proposed marriage is alleged to be just and necessary, the present income of the

applicant, particulars of his commitments and his ascertainable financial obligations and liabilities, the number of his dependents, including persons who would be his dependents as a result of the proposed marriage, and whether the consent or views of the existing wife or wives on the proposed marriage have been obtained.

(4) On receipt of the application, the Court shall summon the applicant and his existing wife or wives to be present at the hearing of the application, which shall be in *camera*, and the Court may grant the permission applied for if satisfied—

(a) that the proposed marriage is just and necessary, having regard to such circumstances as, among others, the following, that is to say, sterility, physical infirmity, physical unfitness for conjugal relations, willful avoidance of an order for restitution of conjugal rights, or insanity on the part of the existing wife or wives;

(b) that the applicant has such means as to enable him to support as required by Hukum Syarak (as per teachings of Shariah) all his wives and dependents, including persons who would be his dependents as a result of the proposed marriage;

(c) That the applicant would be able to accord equal treatment to all his wives as required by Hukum Syarak; and

(d) That the proposed marriage would not cause *darar* sharia to the existing wife or wives.

(e) (*Deleted by Act A902*).

(5) A copy of the application under subsection (3) and of the statutory declaration required by that subsection shall be served together with the summons on each existing wife.

(6) Any party aggrieved by or dissatisfied with any decision of the Court may appeal against the decision in the manner provided in the Administration Enactment for appeals in civil matters.

(7) Any person who contracts a marriage in contravention of subsection (1) shall pay immediately the entire amount of the *mas kahwin* (it means the obligatory

marriage payment due under Hukum Syarak by the husband to the wife at the time the marriage is solemnized, whether in the form of money actually paid or acknowledged as a debt with or without security, or in the form of something that, according to Hukum Syarak, is capable of being valued in terms of money;)

and the *pemberian* (it means a gift whether in the form of money or things given by a husband to a wife at the time of the marriage) due to the existing wife or wives, which amount, if not so paid, shall be recoverable as a debt (Act 303, 2006, p.12).

(8) The procedure for solemnization and registration of a marriage under this section shall be similar in all respects to that applicable to other marriages solemnized and registered in the Federal Territory under this Act, (Act 303, 2006, p.21-22).

[11] The Yang de Pertuan Agang (Paramount Ruler) is a constitutional head. Under Article 40(1) [explained at the end of this note] he acts on ministerial advice except as otherwise is the formal head of each of the three branches of government: the legislature, the executive and the judiciary. He is a component of parliament and may not refuse assent to bills passed by the two houses of parliament. As head of executive, he appoints the prime minister and members of the cabinet, and as head of the judiciary, he appoints the chief justice of the federal court, the president of the court of appeal, the chief judge of each of the two high courts and all judges of the superior courts (Hamza, Wan Arfah 2009, *A First look at the Malaysian Legal system,* Oxford Fajar Sdn. Bhd, Selangor Malaysia, 1st Ed.

Article 40(1) of the Malaysian constitution read as:

(1) In the exercise of his functions under this Constitution or federal law the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet, except as otherwise provided by this Constitution; but shall be entitled, at his request, to any information concerning the government of the Federation which is available to the Cabinet.

(2) The Yang di-Pertuan Agong may act in his discretion in the performance of the following functions, that is to say:

(a) The appointment of a Prime Minister;

(b) The withholding of consent to a request for the dissolution of Parliament;

(c) The requisition of a meeting of the Conference of Rulers concerned solely with the privileges, position, honours and dignities of Their Royal Highnesses, and any action at such a meeting and in any other case mentioned in this Constitution.

(3) Federal law may make provision for requiring the Yang di-Pertuan Agong to act after consultation with or on the recommendation of any person or body of persons other than the Cabinet in the exercise of any of his functions other than :

(a) Functions exercisable in his discretion;

(b) Functions with respect to the exercise of which provision is made in any other Article [Constitution of Malaysia: 2006, Article 40(a), http://www.malaysia.gov.my/EN/Main/MsianGov/GovConstitution/HistoryConstitution/Pages/HistoryofConstitution.aspx retrieved June 3rd, 2012]

[12] Ruju' means a return to the original married state, (Act 303, 2006, p.12).

[13] He is Ahmad bin Abdul Haleem bin Abdussalam bin Abdullah bin Abi Qasim Ibn-e-Taymiyya, born in Turkey in 1263 AD and Died in Damascus (Syria) in 1378 AD. He was known as Sheikh ul Islam.

[14] *Maslaha Mursalah or Istislah* has been defined as "Public welfare neither commanded nor prohibited in any source of Islamic law". On the basis of it, the authority can determine if a specific rule is in the favour of general public or not, provided that it should be within the established limits of the Shariah. www.islam-fyi.com/islamic-words/maslih-mursalah retrieved May 19, 2012.

[15] Pearl (1979) defines *Siyasa Shariyya* "the right of the executive branch of the (Muslim) government to complete the Shariah by regulations of an administrative kind". Pearl, D.A (1979), *A Text book of Muslim Law,* Crown held Ltd, London, p. 20

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Review of Laws Regarding the Dissolution of Marriages

3.1 Procedure of *Talāq* and Comparative Study of the Laws of Both Countries

3.1.1 Literal Meaning of *Talāq* (Divorce)

The literal meaning of the word *Talāq* is to snap off or to separate. Imam *Sarakshi* [d. 1090 AD] has given its literal meaning as (ازالۃ القید) i.e. freedom from bondage. Its root is *Talaqun* (طلق), from which the word *itlāq* (اطلاق) meaning freedom has been derived (Mansoori, 2009, p. 111).

Talāq (divorce) in *Shariah* means terminating with explicit or implied words the bond created by marriage contract. In irrevocable divorce the marriage contract is dissolved instantly, whereas in revocable divorce the marriage contract does not dissolve till the period of probation (*iddat*) is not over; it only weakens.

In Islamic law, a husband is permitted to divorce his wife by pronouncing a *Talāq* or repudiation against her. Although divorce is permitted, however, it is not encouraged and, in religious theory it is considered as un commendable. According to the *Hanafi* school of Muslim law there are three forms of *Talāq*, that is,

(a) The *ahsan* (احسن) form by the pronouncement of one *Talāq* in a period of purity followed by abstinence from sexual intercourse for the period of the *iddah*,

(b) The *hasan* (حسن) form by the pronouncement of the *Talāq* three times in three consecutive periods of purity, that is between three successive menstruations; and

(c) The *bida'at*)بدعت(form by the pronouncement of the *Talāq* three times at shorter intervals or even in immediate succession or by the pronouncement of the three *Talāqs* at once.

In the first case of the marriage tie is dissolved after the *iddah*, but the parties may be reunited by a fresh marriage contract. In the second and third cases not only is the marriage dissolved, but a new marriage cannot be contracted between the parties, until the woman has lawfully married another man and has been divorced after consummation of that marriage or the marriage has been terminated by death. The Shafi school of law does not regard the pronouncement of the *Talāq* three times at short intervals or in immediate succession, or the pronouncement of three *Talāq*s at once, as unlawful. It distinguishes *Talāq* into two kinds, i.e. *Talāq raj'ī*)طالق رجعی(, or revocable divorce, and *Talāq bāin*)طالق ابئن(or irrevocable divorce. *Talāq bāin* is of two kinds:

(a) The divorce by three *Talāqs*, which puts an end to the marriage without the possibility, of remarrying, unless the woman has been lawfully married to another person and has been divorced after consummation of that marriage, or the marriage has otherwise come to an end; and

(b) The divorce of *Khula* where some compensation is paid by the wife, or renunciation of a right made by her; this divorce cannot be revoked but the parties can remarry each other.

Where the divorce is revocable, the husband is allowed to revoke the divorce by the process known in Islamic law as *rujū* (revocation). A husband who has repudiated his wife in a revocable manner has right to take her back as long as she is

still in her period of *iddah*, provided that in the meantime the marriage has not become illicit for any other reason.

Muslim married woman may also apply for divorce. It is, for example, usual to have a condition at the time of marriage or, sometimes after the marriage that if the husband fails to maintain the wife for a period exceeding three months or assaults her and the wife makes a compliant which is proved, then repudiation will be effected for failure of the condition. It is also possible for a Muslim woman to apply for what is in effect an annulment of the marriage by the process known as *fasakh* and also to apply for divorce with the consent of the husband on payment of compensation by the process known as *khulā*.

3.1.2 Procedure of Divorce in Pakistan

The section 7 of Muslim Family Laws Ordinance 1961 is concerned with divorce and this section contains many subsections. As per section 7, the husband must serve the divorce notice to Chairman of the Union Council where the wife resides and to the wife, too. The subsection 7(1) provides that any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of *Talāq* in any form whatsoever, give the Chairman a notice in his writing of having done so, and shall supply a copy thereof to the wife. The subsection 7(2) provides punishment who so contravene the provision of subsection 7(1). It states simple punishment of simple imprisonment for a term which may extend to one year or a fine which may extend to Rupees five thousands or both. Subsection 7 (3) illustrates that *Talāq* (divorce) shall not be effective until the expiration of ninety days from the day on which notice under subsection 7 (1) is delivered to the Chairman of union council. The subsection 7 (4) provides that Chairman of Union Council shall constitute an Arbitration Council with in thirty day after the receiving of notice, for the purpose of

bringing about reconciliation between the parties. This subsection also underlines that Arbitration Council shall take all steps necessary to bring about such reconciliation. The subsection 7 (5) narrates that if the wife is pregnant at the time of *Talāq*, [then] *Talāq* shall not be effective until the period mentioned in subsection[1] 3 or the pregnancy, which be later, ends. The subsection 7(6) provides that nothing shall debar a wife where marriage has been terminated by *Talāq* effective under the section for remarrying the same husband without an intervening marriage with an third person, unless such termination is for the time so effective.

In the light of the procedure laid down in section 7 of Muslim Family Laws Ordinance 1961, the husband pronounces *Talāq*. The wife may announce *Talāq*, if right of divorce has been delegated to her husband, in Court. The husband can pronounce *Talāq* orally or in writing, however, the Shia school of thought restricts the *Talāq* to oral mode only in addition to the necessary requirement of two witnesses. After the pronouncement of *Talāq*, the husband, as soon as possible, informs the Chairman Union Council where the wife is residing under Muslim Family Law Ordinance 1961 about the incidence of divorce in order to enable him for the constitution of Arbitration Council. The husband has to serve a copy of notice of *Talāq* to wife, also. If the wife is exercising the delegated right of divorce, she has to inform in writing the Chairman of Union Council where she resides and has to serve a copy of notice to her husband, too. The Chairman Union Council will direct in writing both parties to nominate one representative each as member for the Arbitration Council. Both parties will inform the Chairman Union Council in written form about nominees. The Arbitration Council will try its best to bring reconciliation between the parties. The pronounced *Talāq* will not effective after expiry of 90 days from the day of delivery of notice of *Talāq* to Chairman union council. Moreover, the husband can

revoke the *Talaq* by announcement or any other means. In situation where the Arbitration Council fails to bring reconciliation, *Talāq* will take effect after the expiration of 90 days from the day of receiving the notice to Chairman Union Council.

3.1.3 Procedure of *Talāq* in Malaysia

It is provided in the section 47 of Islamic Family Law (Federal Territories) Act 1984 that save as is otherwise expressly provided, nothing in the Act shall authorize the Court to make an order of divorce or an order pertaining to divorce or to permit a husband to pronounce a *Talāq* except;

(a) Where the marriage has been registered or deemed to be registered under the Act; or

(b) Where the marriage was contracted in accordance with Hukum Syarak; and

(c) Where the residence of either of the parties to the marriage at the time when the application is presented is in the Federal Territory.

In Kelantan it is provided that the Court shall have jurisdiction to make an order relating to divorce only where both parties to the marriage are domiciled or are temporarily resident in the State at the time of making the application. The Court shall however have jurisdiction to entertain proceedings by a wife although the husband is not domiciled or temporarily resident in the state if:

(a) The wife has been deserted totally by the husband or the husband has been banished from the State under any law for the time being in force relating to the banishment of persons and

the husband was prior to the desertion or banishment domiciled in the State; or

(b) The wife has been domiciled in the State and has been temporarily resident in the State for a period of two years immediately preceding the commencement of the proceedings.

In such cases the issues shall be determined in accordance with the law which would be applicable thereto if the parties were domiciled or temporarily resident in the State.

It is also provided in the Islamic Family Law (Federal Territories) Act 1984 that notwithstanding section 54, a man who has divorced his wife by the pronouncement of *Talāq* outside the Court and with permission of the Court, shall within seven days of the pronouncement of the *Talāq* report to the Court. The Court shall hold an inquiry to ascertain whether the *Talāq* that was pronounced is valid according to Hukum Syarak. If the Court is satisfied that the *Talāq* that was pronounced is valid according to Hukum Syarak, the Court shall, subject to section 124:

(a) Make an order approving the divorce by *Talāq*;

(b) Record the divorce; and

(c) Send a copy of the record to the appropriate Registrar and to the Chief Registrar for registration.

Section 124 of the Act provides that any man who divorces his wife by the pronouncement of *Talāq* in any form outside the Court and without the permission of the Court commits an offence and shall be punished with a fine no exceeding RM 1,000 or with imprisonment not exceeding six months or with both such fine and imprisonment.

5.1.8 Findings

The study of the Family Laws regarding the divorce in both countries i.e. Pakistan and Malaysia reveals that section 7 of Muslim Family Laws Ordinance,1961 is consisted upon 6 subsections as compared to section 47 of Islamic Family Law (Federal Territories) Act 303 which is consisted upon 17 subsections. Comparative study shows that Malaysian law of divorce is more comprehensive and detailed than Pakistan's law of divorce. According to section 47 of Islamic Family Law (Federal Territories) Act 303, the husband or wife will have to request the Court for the purpose of divorce by providing complete detail. The Court will summon both parties and ascertain whether or not reconciliation is possible. If there is no chance of reconciliation or the opposite party shows his consent for divorce, then the Court will order the husband to pronounce one *Talāq* before the judge and the Court will record the divorce and forward the copies of divorce to Registrar and Chief Registrar for the registration of *Talāq*. If the opposite party does not show its consent for divorce or the Court feels the possibility of reconciliation, then the Court will order the formation of Reconciliatory Committee comprising upon a religious officer as Chairman and two members, one each from the wife and husband, who will preferably be their close relatives. The reconciliatory committee will try to bring reconciliation between the couple within the time frame of 6 months. In case of reconciliation, the Court will discard the application of divorce, and , if the reconciliation fails, the Court will order the husband to pronounce single *Talāq* before the Court by recording it and forwarding its copies to Registrar and Chief Registrar, for registration.

As far as the situation of Pakistan, is concerned, the section 7 of Muslim Family Law Ordinance provides that the man who wishes to divorce his wife, will inform in

writing the Chairman of Union Council after pronouncement of *Talaq* and will forward a copy to the wife, too. The Chairman Union Council constitutes an Arbitration council within 30 days after the receipt of notice and directs both parties to nominate one representative each for the council. The Council strives its best to bring reconciliation between the couple and if it fails, it issues a certificate of its failure and *Talāq* becomes effective after the 90 days of the delivery of the notice to the Chairman Union Council.

The Pakistan Divorce law is brief and not comprehensive and it does not provide information about the divorce which is pronounced before valid retirement or consummation, where no *iddat* is prescribed by *Shariah*. In the Pakistan's law, no attention has been paid towards the inclusion of a religious scholar in the Arbitration Council nor the preference for the selection of nominees of the wife and husband has been determined. The single qualification for the Chairman Union Council is being a Muslim. No other Islamic or Modern education is required for the Chairman Arbitration Council. Moreover, preference in selection of representative being close relatives is missing, too. The close relatives are comparatively more sympathetic than strangers.

The registration of *Talāq* or divorce is an issue which require serious attention. In Pakistan, there is no proper mechanism for the registration of *Talāq* which causes many problems in future for the parting couple and their children. The Council of Islamic Ideology has recommended the registration of *Talāq* in its report of 2008-2009. As per subsection 3 of section7, the *Talāq* becomes effective after the 90 days from the day on which notice of *Talāq* was delivered to Chairman Union Council. When the *Talāq* will become effective, the woman will have to wait for *iddat*

in addition to the past 90 days which will prolong her period to get free from the knot of marriage.

Another problem is that if a man pronounces *Talāq*, keeping in view all necessary requirements of *Shariah* but does not inform Chairman Union Council, whether this *Talāq* will be valid or otherwise? From Islamic point of view it should be valid but as per Pakistani law it will not be valid and the man will be subjected to the punishment described in subsection 7 (2).

In the case of *State vs Tauqir Fatima*, the Karachi High Court held that as under section 7 of the Family Laws Ordinance, no notice was given to the Chairman, and the divorce pronounced could take effect only after 90 days of the receipt of the notice, therefore, divorce pronounced, according to husband on 06.12.1962 remained ineffective (because no notice of *Talāq* had been given to the Chairman, Union Council). The Pakistan Divorce Law does not distinguish between revocable and irrevocable, which is contrary to the instructions of Islamic jurisprudence. The provision of postponing the effectiveness of divorce for ninety days and making the counting of 90 days from the date of delivery to the Chairman, it is also against the juristic schools of thought whether *Sunni* or *Shia*.

Recommendations:

1. The section 7 should be made more comprehensive, detailed and concise at par with injunctions of *Shariah* through legislation to include all kinds of Divorce as the Malaysian Islamic Family Law Act 303 has been amended by Act 1261 A of 2006.

2. Proper mechanism should be devised for the registration of *Talāq* and specially trained professionals should be appointed for the said purpose. It is also recommended that Divorce Registration Certificate should be introduced. The researcher agrees with sample of the certificate suggested by the Council of Islamic Ideology Vide its annual report 2008-2009, p. 46, (Attached as Annex- E).

3. Inclusion of religious scholar should be made compulsory in the Arbitration Council in addition to prefer the nominees of both parties being their close relatives.

4. The discrimination between revocable and irrevocable divorce should be included in section 7.

5. Necessary legislation should be made for the divorce before valid retirement or pre-consummation as there no need of waiting for period of *iddah* under the teaching of *Shariah*. In the current situation, a woman has to wait for 90 days for effecting the divorce which is not justified nor sympathetic for women.

6. Pronouncement of divorce without intimation to the Chairman Union Council should be regarded as effective however, suitable penal punishment should be legislated for the violators.

7. A law should be introduced making it obligatory for the husband to comply with his Islamic obligations and liabilities of paying dower, maintenance, return of dowry and custody of minors, and to satisfy the court on all these counts before declaring the divorce valid.

8. A person who pronounces divorces through no fault of the wife should be required to pay compensation to the wife.

3.2 Dissolution of Marriage by Court (*Fasakh*)

The word *fasakh* means annulment or abrogation. It comes from the a root which means to annul a deed or to rescind a bargain. It in context of marriage's annulment it refers to the authority of Muslim *Qazi* to abrogate or annul a marriage on the request of the wife. Hence, it may be defined as the dissolution or recession of marriage's contract by judicial decree (Fyzee, 2007, p. 168).

The juristic basic for *fasakh* has been deduced from the Holy Quran where it is stated to the effect:

(a)

'The parties should either hold together on equitable terms (bil-ma'aruf) or separate with kindness (*bil-ihsan*) (02: 229).

(b)

'When you divorce women and they fulfill the terms of their iddah either take them back on equitable terms. But do not take them back to injure them or to take undue advantage. If any one does that he wrongs his own soul (2: 231)

(c)

نإِ إو وإوسُم تنإِ وح لـون يم

تإِبـم ن للا

'If a wife fears cruelty or desertion on her husband's part there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best even though men's souls are swayed by greed. But if you do

good and practice self-restraint, Allah is well-acquainted with all that you do
(4: 128).

(d)

'If you fear a breach between them, appoint two arbiters one from his family and the other from hers; if they wish for peace, Allah will cause their reconciliation. For Allah has full knowledge and is acquainted with all things
(4: 35).

It is reported that the Prophet (peace be upon him) said:

إروَلِرِ َل

'There must be no harm nor return of harm (Qazweeni, p. 784).

It is also reported that Hazrat Umar (RA), the second Caliph, used to send letters to the commanders of the army about men who had left their wives at home, telling them to detain such persons and direct them to send maintenance to their wives or to divorce them. He also asked them to ensure that if such men divorced their wives they should pay all the maintenance due to them (Tanzil, 1978).

Dissolution of Muslim Marriages Act 1939, which was promulgated during British rule in Indian sub-continent deals with the judicial annulment of marriages. Before the promulgation of this act, the Courts of Indian sub-continent used to decide the cases of dissolution of marriages under the *Hanafi* doctrine with respect to Muslims. Unfortunately, the *Hanafi* doctrine regarding to the dissolution of marriage is very restrictive and denies rights of dissolution to the women. Realizing the demand of the public especially women, a bill was tabled in the National Legislature on April

17, 1938. The bill was passed and became effective on March 17, 1939 as the Dissolution of Muslim Marriages Act, VIII of 1939. This act provided an opportunity to the women to seek dissolution of marriage as per guide lines of *Shariah* described in other schools of thoughts. The act applied to all Muslims living in Indian sub-continent without any discrimination of sect and school of thought and brought harmony in application of Islamic law.

There is no provision in the *Hanafi* school of thought which enables a married Muslim woman to seek a decree form the *Qazi* or the Court to annul her marriage in certain cases e.g. non maintenance by husband, desertion, cruelty and maltreatment etc. The absence of such law caused unspeakable miseries to the Muslim women of Indian sub-continent. However, the *Hanafi* jurists have clearly laid down that in cases where the application of *Hanafi* law causes hardship, there application of a provision of some other juristic school will be permissible. Acting on this principle, the scholars belonging to *Hanafi* school, have issued rulings that a woman can obtain decree dissolving her marriage, to the effect that in cases illustrated in clause 3, Part A of the said act.

3.2.1 Procedure for Dissolution of Marriage in Pakistan:

In Pakistan, the woman can seek dissolution of her marriage under the Dissolution of Muslim Marriages Act 1939. Under this act a woman married under Muslim Law shall be entitled to obtain a decree from the Court for the dissolution of her marriage on any one or more of the following grounds , namely :

(i) that the whereabouts of the husband have not been known for a period of four years ;

(ii) that the husband has neglected or has filed to provide for her maintenance for a period of two years ;

(ii-A) that the husband has taken an additional wife in contravention of the provisions of the Muslim Family Laws Ordinance , 1961 ; [2]

(iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards ;

(iv) that the husband has failed to perform what , without reasonable cause, his marital obligations for a period of three years ;

(v) that the husband was impotent at the time of the marriage and continues to be so ;

(vi) that the husband has been insane for a period of two years or is Suffering from leprosy or a virulent venereal disease ;

(vii) that's she , Having been given in marriage by her father or other guardian before she attained the age of sixteen years, repudiated the

marriage before attaining the age of eighteen years : provided that the marriage has not been consummated ;

(viii) that the husband treats her with cruelty, that is to say;

(a) habitually assaults her or makes her life miserable by the cruelty of conduct even if standard and poor conduct does not amount to physical ill-treatment , or

(b) associates with women of evil leads repute of an infamous life , or

(c) attempts to force her to lead an immoral life , or

(d) disposes of her property or prevents her exercising her legal rights over it , or

(e) obstructs her in the observance of her religious profession or practice , or

(f) if he has more wives than one , does not treat her equitably in accordance with the injunctions of the Quran ,

(ix) on any other ground which is recognized as valid for the Dissolution of Muslim Marriages under Law

Section 4 of Dissolution of Muslim Marriages Act 1939 defines the effect of conversion to another faith. It says that the renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam by Itself shall not operate to dissolve her marriage:

Provided that after standard and poor renunciation, or conversion, the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in section 2; provided further that's the Provisions of this section shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith.

Section 5 of Dissolution of Muslim Marriages Act 1939 explains that the right to dower will not be affected by such dissolution. It describes that the nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of her marriage.

3.2.3 Procedure of Dissolution of Marriage in Malaysia

I. Order for dissolution of marriage or *fasakh*

According to section 52 (1) of Act 303:

A married woman in accordance with Hukum Syarak , shall be entitled to obtain an order for the dissolution of marriage or *fasakh* on any one or more of the following grounds derived, namely:

(a) That the whereabouts of the husband have not been known for a period of more than one year ;

(b) That the husband has neglected or failed to Provide for her service for a period of three months ;

(c) That the husband has been sentenced to imprisonment for a period of three years or more;

(d) That the husband has failed to perform , without reasonable cause, his marital obligations (*nafqah batin*) for a period of one year;

(e) That the husband was impotent at the time of marriage and remains so and she was not aware at the time of the marriage that he was impotent

(f) That the husband has been insane for a period of two years or is suffering from Leprosy or is suffering from Vertigo or a Venereal disease in a communicable form ;

(g) That she , having been given in marriage by her *wali mujbir* before she attained the age of *baligh*,[3] repudiated before the marriage attaining the age of eighteen years , the marriage not having been consummated ;

(h) That the husband treats her with cruelty , that ' is to say , inter alia ,

i. habitually assaults her or her life miserable Makes by cruelty of conduct , or

ii. associates with women of evil repute or leads what, According To Hukum Syarak, is an infamous life , or

iii. attempts to force her to lead an immoral life , or

iv. willing of her property or her from exercising her prevents legal rights over it , or

v. obstruct her in the observance of her religious obligations or practice , or

vi. if he has more wives than one, does not treat her equitably in accordance with the requirements of Hukum Syarak ;

(i) that even after the lapse of four months the marriage has been still not consummated owing to the willful refusal of the husband to consummate it ;

(j) that she did not consent to the marriage or her consent was not valid , whether in consequence of duress , mistake , unsoundness of mind , or any other circumstance recognized by Hukum Syarak ;

(k) That at the time of the marriage she , though able of giving a valid consent, was whether continuously or intermittently , a mentally disordered person within the meaning of the Mental Disorders Ordinance 1952 [Ordinance 31 of 1952] in the case of the Federal Territory of Kuala Lumpur, or the Lunatics Ordinance of Sabah [Sabah Cap . 74] in the case of the Federal Territory of Labuan , and her mental disorder was of such a kind, or to such extent as to render her unfit for marriage ;

(i) Any other ground that is recognized as valid for dissolution of marriages or *fasakh* under Hukum Syarak .

(1A) Any person married in accordance with Hukum Syarak shall be entitled to obtain an order for the dissolution of marriage or *fasakh* on the ground that the wife is incapacitated which prevents sexual intercourse .

(2) No order shall be made on the ground in paragraph (1) (c) until the final sentence has become final and the husband has already served one year of the award.

(3) Before making an order on the ground in paragraph (1) (e) shall the Court , make an order requiring the husband to satisfy within the Court on the application by the husband, a period of six months from the date of the order that he has ceased to be impotent , and if the husband so satisfies the Court within that period , no order shall be made on that ground .

(4) No order shall be made on any of the grounds in subsection (1) if the husband satisfies the Court that the wife , with knowledge that it was open to her to have the marriage repudiated so conducted herself in relation to the husband as the husband to lead reasonably to believe that she would not seek to do so, and that it would be unjust to the husband to make the order .

II. Presumption of death: Article 53 (1) of the afore said act mentions that if the husband of any woman has died , or is believed to have died , or has been not heard of for a period of four years or more, and the circumstances are such that ought he , for the purpose of enabling the

woman to remarry , presumed to be in accordance with Hukum Syarak to be dead , the Court may, on the application of the woman and after such inquiry as may be proper , issue in the prescribed form a certificate of presumption of death of the husband and the Court on the implementation of the woman make an order for the dissolution of marriage or *fasakh* as provided for under section 52.

(2) A certificate under subsection issued (1) shall be deemed to be a certificate of the death of the husband within the meaning of paragraph 14 (4) (b).

(3) In the circumstances mentioned in subsection (1) , a woman shall not be entitled to remarry in the lack of a certificate Issued under subsection (1) , notwithstanding the High Court that may have given leave to presume the death of the husband .

(4) A certificate under subsection Issued (1) shall be registered as if it effected a divorce.

III. Other cases of *fasakh*: The cases of *fasakh* can include those:

(1) Where either the husband or the wife has become a *murtad* (apostate) and does not repent;

(2) Where either the husband or wife has embraced Islam, while the other remains in the former faith;

(3) Where it becomes known that the husband and wife are related by fosterage;

(4) Where the husband or wife are married by their father or grandfather when have not reached puberty, he or she may have the

right of continuing or parting or putting an end to the marriage on attaining puberty.

In the Federal Territories it is enacted by the Islamic Family Law Act 1984 that a woman married in accordance with Hukum Syarak, shall be entitled to obtain an order for the dissolution of marriage or *fasakh* on any one or more of the following grounds, namely:

(a) That the whereabouts of the husband have not been known for a period of more than one year;

(b) That the husband has neglected or failed to provide for her maintenance for a period of three months;

(c) That the husband has been sentenced to imprisonment for a period of three years or more;

(d) That the husband has failed to perform, without reasonable cause, his marital obligations (*nafkah batin*) for a period of one year;

(e) That the husband was impotent at the time of marriage and remains so and she was not aware at the time of the marriage that he was impotent;

(f) That the husband has been insane for a period of two years or is suffering from leprosy or Vitiligo or is suffering from a venereal disease in a communicable form;

(g) That she, having been given in marriage by her wali *mujbir* before she attained the age of *baligh*, repudiated the marriage before attaining the age of 18 years, the marriage not having been consummated;

(h) That the husband treats her with cruelty, that is to say, inter alia;

(i). Habitually assaults her or makes her life miserable by cruelty of conduct; or

(ii). Associates with women of evil repute or leads what, according to Hukum Syarak, is an infamous life; or

(iii). Attempts to force her to lead an immoral life; or

(iv). Disposes of her property or prevents her from exercising her legal rights over it; or

(v). Obstructs her in the observance of her religious obligations or practice; or

(vi). If he has more wives than one, does not treat her equitably in accordance with the requirements of Hukum Syarak;

(i) That even after the lapse of four months the marriage has still not been consummated owing to the willful refusal of the husband to consummating it;

(j) That she did not consent to the marriage or her consent was not valid, whether in consequence of duress, mistake, unsoundness of mind, or any other circumstances recognized by Hukum Syarak;

(k) That at the time of the marriage she, though capable of giving a valid consent, was, whether continuously or intermittently, a mentally disordered person within the meaning of the Mental Disorders Ordinance 1952 in the case of the Federal Territory of Kuala Lumpur, or the Lunatics Ordinance in the case of the Federal Territory of Labuan, and her mental disorder was of such a kind or to such extent as to render her unfit for marriage;

(l) Any other ground that is recognized as valid for dissolution of marriages or *fasakh* under Hukum Syarak.

Any person married in accordance with Hukum Syarak shall be entitled to obtain an order for the dissolution of marriage or *fasakh* on the ground that the wife is incapacitated which prevents sexual intercourse.

Before making an order on the ground in paragraph (e), the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of six months from the date of the order that he has ceased to be impotent, and if the husband to satisfies the Court within a period, no order shall be made on that ground.

No order shall be made on any of the above ground if the husband satisfies the Court that the wife, with knowledge that it was open to her to have the marriage repudiated, so conducted herself in relation to the husband as to lead the husband reasonably to believe that she would not seek to do so, and that if would be unjust to the husband to make the order.

In Kelantan, it is provided in the Islamic Family Law Enactment that a woman married in accordance with Hukum Syarak shall be entitled to obtain an order for the dissolution of her marriage by *fasakh* on any one or more of the following grounds namely:

(a) That the husband was impotent and continues to be so for the period of one year after the complaint;

(b) That the husband was insane or is suffering from leprosy or Vitiligo of from a virulent venereal disease, so long as there is no clear proof to show that she has accepted that fact;

(c) That the wife, after having been given in marriage by her father or grandfather before she attains puberty in accordance with Hukum Syarak, repudiated the marriage before attaining the age of 18 years;

(d) That the consent of the wife to the marriage was given in an unlawful manner whether in consequence of duress, mistake,

unsoundness of mind or other reasons in accordance with Hukum Syarak;

(e) That at the time of the marriage the wife was (whether continuously or intermittently) the Mental Disorders Ordinance 1952, of such a kind or to such an extent as to make her unfit for marriage;

(f) On any other ground which is recognized as valid for the dissolution of marriages by *fasakh* in accordance with the Hukum Syarak.

In Kedah it is provided in the Islamic Family Law Enactment that a person married under the Enactment shall be entitled to obtain an order for dissolution of marriage or *fasakh* on one or more of the grounds below:

(i) That the husband because of poverty is unable to maintain her;

(ii) That the husband becomes impotent and remains so, provided she does not know that at the time of marriage that the husband is impotent;

(iii) That the wife is incapacitated which prevents sexual intercourse;

(iv) That the husband or his wife is insane for a period of one year or is presently suffering from a disease called leprosy, vitiligo or venereal disease which is epidemic;

(v) That the husband has an exceptional penis;

(vi) That the wife's consent to the marriage has been obtained illegally as a result of force, mistake, mental defect or any other cause;

(vii) That at the time of marriage the wife even though capable of giving a valid consent is mentally defective either continuous or temporary within the meaning of Mental Disorder Ordinance 1952 of either type or to the extent that renders her incapable of marrying.

In Pahang it is provided in the Islamic Family Law Enactment that a woman married in accordance with Hukum Syarak shall be entitled to obtain an order for the dissolution of her marriage or *fasakh* on any one of the following grounds:

(a) That the husband was impotent and continued to be so for a period of one year after the complaint;

(b) That the husband was insane or is suffering from leprosy or Vitiligo or from a virulent venereal disease, so long as there is no clear proof to show that she has accepted that fact;

(c) That the consent of the wife to the marriage was given in an unlawful manner whether in consequence of duress, mistake, unsoundness of mind or other reasons in accordance with Hukum Syarak;

(d) That at the time of the marriage the husband was, whether continuously or intermittently, a mentally disordered person within the meaning of the Mental Disorders Ordinance 1952 of such a kind or to such an extent as to make him unfit for marriage.

(e) On any other ground which is recognized as valid for the dissolution of the marriage or *fasakh* in accordance with Hukum Syarak.

3.2.4 Findings

Comparative study of laws regarding the Dissolution of Marriage (*fasakh*) depicts that a woman can ask the Court for dissolution of her marriage knot in both countries. The laws of both countries regarding dissolution of marriage are similar to some extent but, at the same time, they slightly differ from each other. For example, if the whereabouts of the husband are not known for a certain period, which is one year in Malaysia and four years in Pakistan, the wife can ask the Court for dissolution of her marriage. Another example is the negligence and failure of the husband towards the provision of maintenance for a specific period enables the wife to obtain dissolution of her marriage from the Court but duration of specific period is different in both countries i.e. three months in Malaysia and two years in Pakistan.

Similarly, if the husband is imprisoned for particular period, which is three years in Malaysia and seven years in Pakistan, the wife becomes entitled to seek dissolution of marriage from the Court. If the husband fails to perform his marital obligations without reasonable cause, it enables the wife to seek dissolution of marriage but the duration of this failure is vary from each other in both countries. This duration is one year in Malaysia and three years in Pakistan.

In the same manner, if husband does not consummate the marriage willfully, even after the lapse of four months in Malaysia and three years in Pakistan, the marriage can be dissolved on the request of wife.

Moreover, there are some clauses in the laws of both countries regarding the Dissolution of Marriage which are different from each other. For example, the Malaysian law recognizes the valid consent of the wife for marriage without duress, as compulsory for the conduct of marriage while this kind of clause is missing in Pakistan's law. Another clause which is recognized by Malaysian law is the problem

of mental disorder of the woman which renders her unfit for marriage. At the other hand, Pakistan's law counts the *Liā'n*)لعان(as a valid ground for the dissolution of marriage, which is missing in Malaysian law.

Amazingly, there are some clauses which are identical in both countries. For example, if the husband treats his wife with cruelty, the wife can claim dissolution of marriage in both countries. Another example of similarity is that if the husband remains insane for a period of two years or is suffering from leprosy or a communicable venereal disease.

Similarly, the law of both countries grants option of puberty to the wife if she was given in marriage by her father or other guardian (*wali mujbir* in Malaysian Law) before the attaining the age of fifteen years in Pakistan's law and puberty in Malaysian law, she can repudiate the marriage before attaining the age of eighteen years. The difference between both laws is that the Malaysian law recognizes "puberty" instead of determining age in years, provided that marriage has not been consummated.

3.2.5 Recommendations:

1. There is lack of distinction between *khul'a, fasakh* and dissolution of marriage on the grounds identified in dissolution of Muslim Marriages Act, 1939. Since the term *khul'a*, its grounds and conditions are not defined in the law, hence it is generally considered on the grounds provided under section 2 of the Dissolution of Muslim Marriages Act, 1939. Therefore, it is recommended that each term should be included in the Act under clear and obvious definition in order to provide maximum relief to women folk.

2. Mostly women are forced to ask for *khul'a* by the husband and in-laws so that she may give up all her due rights. This situation is against the clear injunctions of Islam as lack of provision to investigate into the cause of *khul'a* though there is no Legal bar. Therefore, it is recommended that there should be a proper mechanism to check the justification of *khul'a* for providing relief to women under duress.

3. The provision of impotency of husband is limited to the impotency at the time of marriage, and it does not take into consideration impotency which may occur subsequently. Therefore, it is recommended that subsequent occurrence of impotency of husband after the marriage should be included in the Act through necessary amendment.

4. It is further recommended that the Court should use the term of *fasakh* instead of *khul'a* in the cases where the Court orders separation between the married couple in order to distinct between the both terms under the *Shariah*.

3.3 Review of the Laws of Maintenance in Both Countries

3.3.1 Definition of Maintenance:

The word maintenance allowance in English stands for *nafqah* (نفقہ) which literally means *ikhrāj* (إخراج) i.e. taking out or with drawl. In its dictionary meaning *nafqah* is that which one spends on his children etc. This word is itself a noun in etymology. In legal terminology *nafqah* refers to provision for necessities of life to wife in consideration of her reserving herself for the husband. In general terminology to make provision for one's necessities of life by another in consideration of his labour is called *nafqah* (Al-Jaziri, 2003, p. 485).

The *Shariah* has given a right to the husband to retain a hold on his wife in return whereof it is obligatory on him to provide maintenance to her. Article 369 of Muhammadan Law defines maintenance as food, raiment and lodging (Mulla, 1995, p. 548). In the case of *Ahmadellah v. Mafizuddin*, [4] the learned Court held that the word maintenance includes other necessary expenses for mental and physical well being of a minor, according to his status in society. Educational requirements were included in the definition.

A more comprehensive definition has been carried out in the *Maqsood Ahmed Sohail v. Abida Hanif* [5] by the Honourable Court. The Court held that maintenance means keeping in existence, to preserve, to support, to make good. Maintenance includes food, raiment, lodging and other necessary expenses for mental and physical well being. Physical and mental well being of wife is needed for delivery of child as well. Grant of delivery expenses is thus, a part of maintenance.

Maintenance (*nafqah*) generally includes food, clothes and dwelling. There are other necessary articles as well, which are included in *nafqah* for example soap, oil,

water, medicine and similar other articles and things which are necessary for the livelihood and comfort of a woman.

Under the *Shariah* it is the duty of the husband to provide cooked food and stitched clothes to his wife. A wife cannot be compelled to cook food for herself, much less for the husband: nor she is to be compelled to stitch her clothes. The husband is bound to provide her a separate house or a separate portion of a house which has an independent entrance and exit, although she can, by her free will, live with the parents or other relation of the husband.

The maintenance allowance is incumbent on the husband due to his wife's surrender of her person to him. There are three grounds which make it obligatory on one to provide maintenance for the dependents:

(i). Marriage

(ii). Consanguinity

(iii). Ownership

Islamic instructions obligate maintenance for close relatives (consanguine relatives) as well, but the present study is concerned with the maintenance of wife, therefore, maintenance of close relatives and caused by owner ship will not be discussed in it.

3.3.2 Maintenance of Wife in Pakistan's Law:

Maintenance of wife is governed in Pakistan by four legal documents, which are as under:

(a). Section 9 of Muslim Family Laws Ordinance 1961

(b). Muhammadan Law

(c). Code of Criminal Procedure

(d). Court Decisions

(a). Section 9 of Muslim Family Laws Ordinance 1961: Section 9 of Muslim Family Law Ordinance 1961, explains the maintenance, which has three sub sections. The sub section (1) provides that if any husband fails to maintain his wife adequately, or where there are more wives than one, fails to maintain them equitably, the wife, or all or any of the wives, may in addition to seeking any other legal remedy available apply to the Chairman who shall constitute an Arbitration Council to determine the matter, and the Arbitration Council may issue a certificate specifying the amount which shall be paid as maintenance by the husband. The subsection (2) provides that a husband or wife may, in the prescribed manner, within the prescribed period, and on payment of prescribed fee; prefer an application for revision of the certificate, [to the collector] concerned and his decision shall be final and shall not be called in question in any Court. The sub section (3) provides that any amount payable under subsection (1) or (2), if not paid in due time, shall be recoverable as arrears of land revenue (Manan, 1995, p. 5).

(b). Muhammadan Law: Sections 277-280 of Muhammadan Law describes maintenance for wife. Section 277 illustrates that the husband is bound to maintain his wife (unless she is too young for matrimonial intercourse) so as long as she is faithful to him and obeys his reasonable orders. But he is not bound to maintain a wife who refuses herself to him, or is otherwise disobedient, unless the refusal or disobedience is justified by non-payment or prompt dower, or she leaves the husband's house on account of his cruelty.

Section 278 states that if the husband neglects or refuses to maintain his wife without any lawful cause, the wife may sue him for maintenance, but she not entitled to a decree for past maintenance, unless the claim is based on as specific agreement. Or, she may apply for an order of maintenance under the provisions of the Code of

Criminal Procedure, 1898, section 488, in which case the Court may order the husband to make a monthly allowance in the whole for her maintenance not exceeding five hundred rupees.[6]

Section 279 has two subsections, according to subsection (1), after divorce, the wife is entitled to maintenance during the period of *iddat*.[7] If the divorce is not communicated to her until the expiry of that period, she is entitled to maintenance until she is informed of the divorce. Subsection (2) states that a widow is not entitled during the period of *iddat* consequent upon her husband's death.

Section 280 of Muhammadan Law is related to agreement for future maintenance. It provides that an ante nuptial agreement between a Mahomedan and his prospective wife, entered into with the object of securing the wife against ill-treatment and of ensuring her suitable maintenance in the event of ill-treatment, is not void as being against public policy. Similarly, an agreement between a Mahomedan and his first wife, made after his marriage with as second wife, providing for a certain maintenance for her if she could not in future get on with the second wife, is not void on the ground of public policy. Similarly, an agreement by a Mahomedan with his second wife that he would allow her to live in her parent's house and pay her maintenance is not against public policy. It had been held that an agreement for future separation between husband and wife is void as being against public policy under the section 23 of Contract Act, 1872.[8] An agreement, therefore, which provides for a certain maintenance to be given to the wife in the event of future separation between them, is also void. If the marriage is dissolved by divorce, the wife is entitled to maintenance for the period mentioned in section 279, and not for life, unless the agreement provides that is for life (Mulla, 1995, pp. 414-420).

(c). Code of Criminal Procedure: It has been provided under section 488 of Code of Criminal Procedure (1898) of Pakistan that (1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable maintain itself, [....} a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding four hundred rupees in the whole, as such Magistrate thinks fit and to pay the same to such person as the Magistrate from time to time directs.

(2) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintenance.

(3) *Enforcement or order***.** If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of such month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing. Provided further that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due.

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if without any sufficient reason, she refuses to live with her husband or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reasons she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

(6) All evidence under this Chapter shall be taken in the presence of husband or father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader, and -shall be recorded in the manner prescribed in the case of summons-cases; Provided that if the Magistrate is satisfied that he is willfully avoiding service or willfully neglects to attend the Court the Magistrate may proceed to hear and determine the case ex-parte. Any orders so made may be set aside for good cause shown on application made within three months from the date thereof.

(7) The Court in dealing with applications under this section shall have power to make such order as to costs as may be just.

8) Proceedings under this section may be taken against any person in any district where he resides or is, where he last resided with his wife, or, as the case may be, the mother of the illegitimate child.

Section 489 of Criminal Procedure Code 1898 states alteration in allowance**.** It provides, (1) On proof of a change in the circumstance of any person receiving under section 488 a monthly allowance, or ordered under the same section to pay monthly allowance to his wife or child, the Magistrate may make such alteration in the allowance as he thinks fit provided that if he

increases the allowance the monthly rate of four hundred rupees in the whole be not exceeded.

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 488 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

Section 490 of CPC 1898 is regarding the enforcement of order of maintenance**.** It illustrates that a copy of order of maintenance shall be given without payment to the person in whose favour it is made or to his guardian, if any, or to whom the allowance is to be paid; and such order may be enforced by any Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due].

(d). Court Decisions: The liability of the husband for providing maintenance to his wife is a part of the fulfillment of the purposes of a marriage contract, and it is based on socio-economic suitability. Hence any contract that effects this right of the wife shall be in-operative, in as much as such a contract, according to *Shariah* is contrary to public policy. The wife may, however, release her husband from past liability, but not from future maintenance exceeding one month. The honourable Courts had issued various judgments that husband is bound to maintain his wife. [9]

Regarding agreement to pay separate maintenance was observed by a Division Bench of the West Pakistan High Court, Karachi, consisting of *Qadeeruddin Ahamd* and *Ilahi Bakhsh Khamisani, JJ*, in the case of *Muhmmad Yasin vs. Khushnuma Khatun*, [10] "that under Muhammadan Law the contract of marriage has for its "design and object" the unity of the lives of wife and husband for themselves and for the family they raise. It is instituted to meet one of the "prime and original necessities" of life and meant to bring "solace" to human life. The spouses have a

right to claim and enjoy their bodily union, and the wife is under an obligation to obey her husband at least within reasonable limits. Dealing with the standard of reasonableness their Lordship held that the standard must be set by Muhammadan Law, which does not countenance disobedience of the wife and her denial to give company to her husband on financial grounds, much less does it tolerate elements of self destruction in marriage. No religion or accepted public policy tolerates it. There is no real difference in principle between ante-nuptial and post-nuptial agreements providing that the husband should pay maintenance to the wife if she was displeased and lived separately but different consideration would apply when facts disclose that the unhappiness of the wife was justified and that after experience the parties made a provision by an agreement to have intact the chances of reconciliation and happier union. We believe that an agreement to design would be good in Law, but think that an agreement calculated to provide for indefinite separation under the tie of marriage cannot be upheld. It was held further that if wife accepts the situation and it is presumed that the arrangement does not strain her moral stability, the husband's obligation in such a situation to maintain her and thus to provide her with the means to continue to live separately would be inconsistent with the design and object of Muhammadan marriage. In the case shortly before "*nikāh*" the husband executed as agreement the third term (condition) of which was as follows:

> "Thirdly, if God forbids, there be any disagreement between me and my wife. I shall every month to pay to her one-third of my income as her maintenance. If I fail to so, my wife , *Khwaja Abdul Waheed Saheb* and *Khwaja Muhammad Alam Saheb*, brothers of my wife, shall be entitled to recover it through Court from my moveable and immovable property".

Turning to the third term of the agreement noted above, their Lordships observe, we find it obvious from the record that there was no reason for the respondent (wife) to expect ill-treatment form her prospective husband, but she was not certain whether the union would make her life happy and therefore, she made it a condition of marriage that if there was disagreement, she would be paid one-third of the income of the prospective husband. The nature of disagreement was not specified. If she happened not to like her husband or later developed abhorrence for him, there could be disagreement between the two: or if she developed objectionable familiarity with somebody and the husband objected to it, they would disagree. If they disagreed she could demand and recover maintenance form the husband and could go her own way with her independent means to live separately, as if they were not wife and husband". It was thus held, that the third term of the agreement under review defeats the provisions of Muhammadan Law. It is also opposed to public policy, and as such void under section 23 of the Contract Act.

In *Umara Khan vs. Sultana etc*., the Court held that when wife, of her own accord, left her husband's house and, therefore, is herself responsible for being not maintained by him, and so the question of the husband's neglect to maintain her does not arise al all. [11]

When wife refuses to go to husband's house without sufficient cause, it was held in the case of *Majida vs. Poghala Mohammad*, that as the wife has refused herself to return to her husband's house without sufficient cause she is not entitled to maintenance.[12]

Maintenance of wife, nature of obligation of husband was stated by the honourable Lahore High Court that the maintenance of a wife is the bounden duty of husband irrespective of his minority, illness or imprisonment or the richness of the

wife so much so that the obligation devolves on the father of a minor husband with a right of recovery against him when he is in a position to repay the amount. [13]

The wife refusing to live with husband without sufficient cause, husband not bound to maintain her and dissolution of marriage cannot be claimed for non-maintenance.: The right of the wife to obtain maintenance from the husband is subject to her living with him and if she refuses to live with him without reasonable cause, then she is not entitled to maintenance and failure of the husband to provide her with maintenance is those circumstances would not entitle the wife to dissolution of the marriage tie. [14]

The wife who is claiming maintenance and separate residence in pursuance of agreement with husband and husband is refusing maintenance and suing for restitution of conjugal rights. The Court may refuse to grant decree of restitution in circumstances of the cause, where an agreement made by the husband with his wife allows her to live away from him in case of disagreement or when he takes a second wife, it can in no way be termed as opposed to public policy either under the Muslim Law or within the meaning of section 23 of the Contract Act. A marriage between a Muslim male and a female is purely in the nature of a civil contact and the wife is entitled to protect herself at the hands of her husband in case of their future differences. Where the agreement is to the effect that wife is entitled to receive alimony in the house of her parents or anywhere else where she chooses to reside in case the husband takes a second wife, there is nothing in such an agreement which may be considered to offend against the term "Public policy" which is very board and it is not safe to rely upon it in such cases as a ground for legal decision. It was thus, "It is true that it is the duty of the wife to follow the husband wherever he desire her to go. But such an obligation of the wife to live with her husband at all times and in all

circumstances is not an absolute one. The law recognizes circumstances which justify her refusal to live with him. For instance, if he has habitually ill-treated her, if he has deserted her for a long time, etc. or he has directed her to leave his house or even connived at her doing so. On all such occasions the husband cannot require his wife to re-enter the conjugal domicile nor the Court of justice can give him assistance to restore him the hand of his wife. The bad conduct or gross neglect of the husband under the Muslim Law is good defense to a suit brought by him for restitution of conjugal rights. Where the husband has failed to provide any maintenance for the defendant wife and her daughter and she was compelled to go to the Criminal Court to enforce the husband's obligation of maintenance under section 488, Criminal Procedure is such circumstance the husband is guilty failure on his part to perform his obligation imposed on him by the agreement and these circumstance afford a sufficient ground to refuse to the husband any relief in his suit. [15]

If the wife is living separately and refuses to come back to husband's house justified on ground of cruelty etc, the husband is bound to maintain her. In Muslim Law it is the duty of the husband to maintain his wife. She in not entitled to maintenance when she refuses to go her husband's house. However, if the refusal or disobedience is justified by non-payment of prompt dower or she leaves the husband's house on account of his cruelty, the husband is not absolved of the duty to maintain the wife because separate maintenance can be claim by the wife when the husband has turned her out or the treatment or misunderstanding between them is such that it is irremediable and her return to the husband's house in likely to give rise to fresh troubles and disputes. [16]

According to *Hanafi* school of law for fixation of *nafqah* (maintenance allowance) the status of the wife is taken into consideration while according to Shafi

school of law the status and capacity of the husband is the determining factor. It is, however, proper that the condition, status and capacity of both husband and wife be taken into consideration while fixing the maintenance. If the wife is rich and the husband be poor the preferable opinion, according to *Hanafi* doctrine, is that payment of maintenance at an average rate shall be incumbent on him. But according to the Shafi school he shall be liable to pay at the lowest possible rate as per the Qur'anic verse:

ِقمْنيَ فـعقزمهم يعلرمُ قوَمم عسمَةِ عسو ِقمْيِ مل هابتَأما
ف مْ ر للاأتهِما
لا
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"Let the man of means spend according to his means: and the man whose resources are restricted, let him spend according to what Allah has given him. puts no burden on any person beyond what He has given him" (65:07).

As far as the case of past maintenance is concerned**,** this has been constant view of the Indo-Pakistan Court that when the parties are *Hanafi* Muslims, the wife is held not entitled to past maintenance unless there is an agreement of Court's decree. A division Bench of the High Court of West Pakistan, Lahore consisting of *Anwar ul Haq* and *Muhammad Afzal Cheema*. JJ, however, held that the wife can justly claim maintenance from the date of accrual of the cause of action and not necessarily from the date of her first seeking redress i.e. the date of application or filing suit therefore. Their Lordships, in this case relied upon a quotation from the book *Zad al-Ma'ad* of *Ibn e Qayyim* who was an exponent of *Hanbali* law. The learned judges held, "The mere fact that a neglected wife has been hesitant in promptly coming to the Court or

has been pursuing alternative remedies out of Court cannot in all fairness be so

constructed as to deprive her of the right of maintenance from the day when the cause

of action accrued to her. The Courts have thus jurisdiction to grant such maintenance subject of course to considerations of limitation and the relevant circumstances of each case.[17]

3.3.3 Maintenance of Wife in Malaysia

A wife is entitled to reasonable maintenance from her husband during the marriage. In the Federal Territory, section 59 (1) of the Islamic Family Law Act 1984 provides that the Court may, subject to Hukum Syarak order a man to pay maintenance to his wife.

Sub section (2) illustrates, subject to Hukum Syarak and confirmation by a Court, a wife shall not be entitled to maintenance when she is *nushuz* (disobedience) or unreasonably refuses to obey the lawful wishes or commands of her husband, that is to say, inter alia:

(a) when she withholds her association with her husband;

(b) when she leaves her husband's home against his will;

(c) when she refuses to move with him to another home or place without any valid reason according to Hukum Syarak.

Sub section (3) reads, as soon as the wife repents and obeys the lawful wishes and commands of her husband, she cases to be *nushuz*.

According to section 60 of Islamic Family Law Act 1984, the Court may order any person liable thereto according to Hukum Syarak to pay maintenance to another person where he is incapacitated, wholly or partially, from earning a livelihood by reason or mental or physical injury or ill-health and the Court is satisfied that having regard to the means of the first-mentioned person it is reasonable so to order.

Section 61 of Islamic Family Act 1984 illustrates; in determining the amount of any maintenance to be paid, the Court shall base its assessment primarily on the means and needs of the parties, regardless of the proportion the maintenance bears to the income of the person against whom the order is made.

Section 62 of Islamic Family Law 1984 provides; the Court may, when awarding maintenance, order the person liable to pay the maintenance to secure the whole or any part of it by vesting any property in trustees upon trust to pay the maintenance or a part thereof out of the income from the property.

The Court has power to order for the compounding of maintenance. In this connection, the section 63 reads as "an agreement for the payment, in money or other property, of a capital sum in settlement of all future claims to maintenance shall not be effective until it has been approved, with or without conditions, by the Court, but when so approved shall be a good defense to any claim for maintenance".

The section 64 provides duration of orders for maintenance. It provides; "except where an order for maintenance is expressed to be for any shorter period or is rescinded, an order for maintenance shall expire on the death of the person against whom or in whom favour the order was made, whichever is the earlier".

The section 65 reads about Right to maintenance or *pemberian* [18] after divorce. Its subsection (1) illustrates; "the right of a divorced wife to receive maintenance form her former husband under any order of Court shall cease on the expiry of the period of '*iddah* or on the wife being *nusyuz*' ". While its subsection (2) provides; the right of a divorced wife to receive a pemberian from her former husband under an agreement shall cease on her remarriage.

The section 66 of afore mentioned Act describes power of Court to vary orders for maintenance. It follows; "the Court may at any time and from time to time vary or may at any time rescind, any subsisting order for maintenance whether secured or unsecured, on the application of the person in whose favour or against whom the order was made where it is satisfied that the order was based on any

misrepresentation or mistake or where there has been any material change in the circumstances".

The Court has also power to vary agreement for maintenance and in this regard, section 67 of Islamic Family Law Act 303 provides; "subject to section 63, the Court may at any time and from time to time vary the terms of any agreement as to maintenance made between husband and wife, whether made before or after the appointed date, where it is satisfied that there has been any material change in the circumstances, notwithstanding any provision to the contrary in the agreement".

Section 68 of Islamic Family Act 303 provides about maintenance payable under order of Court to be inalienable. It illustrates that maintenance payable to any person under any order of Court shall not be assignable or transferable or liable to be attached, sequestered, or levied upon for , or in respect of, any debt or claim.

Section 69 has two sub sections which provides information about recovery of arrears of maintenance. Sub section (1) provides that arrears of unsecured maintenance shall be recoverable as a debt from the defaulter and, where they accrued due before the making of a receiving order against the defaulter, shall be provable in his bankruptcy and, where they accrued due before his death, shall be a debt due from his estate. While sub section (2) provides that arrears of unsecured maintenance that accrued due before the death of the person entitled thereto shall be recoverable as a debt by legal personal representatives of the person.

Section 70 of Islamic Family Law Act, 1984 speaks about interim maintenance. Its sub section (1) provides that where the Court is satisfied that there are grounds for payment of maintenance, the Court may make an order against the husband for payment of interim maintenance to take effect at once and to be in force until an order of Court is made on the applications for maintenance. The sub section

(2) provides that the husband may adjust the interim maintenance paid against the amount ordered to be paid for maintenance under the order of the Court, provided the amount received by the wife, after any deduction is sufficient for her basic needs.

Section 71 of Islamic Family Law Act 303, 1984 illustrates right of woman to accommodation. Its sub section (1) describes as a divorced woman is entitled to stay in the home where she used to live when she was married, for so long as the husband is not able to get other suitable accommodation for her. The sub section (2) provides as the right to accommodation provided in sub section (1) shall cease:

(a). if the period of "*iddah*" has expired; or

(b). if the period of guardianship of the children has expired; or

(c). if the woman has remarried; or

(d). if the woman has been guilty of open lewdness (*fahisyah*),

and thereupon the husband may apply to the Court for the return of the home to him.

5.3.4 Findings

Providing maintenance to wife is the duty of husband in Islamic Law when the wife is competent to surrender herself to her husband and is obedient and faithful to him. The Courts in Pakistan have the decided in the light of what is stated in the *Hidāya* based on *Hanafi* school of thought and have taken guidance from different commentaries of the Holy Qur'an and in most of these cases have reinterpreted the verses of the Holy Qur'an for the sake of justice to the women folk. The Courts in Pakistan have so far contributed a lot to recognize and protect the rights of maintenance to wives. Post divorce maintenance though differently interpreted by some jurists and commentators of the Holy Qur'an is understood and recognized till the expiry of *iddat* period and beyond the it in Islamic and domestic law. Widows are not entitled to maintenance as they have to get share out the estate of her deceased husband and this accepted in both Islamic and domestic law. The quantum of maintenance in Islamic law and domestic law of Pakistan is not explicitly specified but can be determined differently in different circumstances and the law is not rigid so far. The quantum of maintenance in Islamic law is recognize by some jurist in regard to the position of husband, or wife or with regard to the wife requirement and local custom. The Islamic law and domestic law of Pakistan obliged wife to surrender herself to her husband and be obedient to him otherwise and husband may refuse maintenance to her. From the study of both classical Islamic law of maintenance and domestic, it is obvious that both are similar in regard to liability of husband to provide maintenance to his wife, maintenance to widows, post divorce maintenance, quantum of maintenance and the refusal of husband to pay maintenance to his wife. As there are different interpretations of the verses of the Holy Qur'an and Sunnah of the Prophet (SAW) so the Courts in Pakistan are following that which is in the best

interest of society and particularly for women community in order to eradicate social injustice.

While on the other hand, the Malaysian laws of maintenance are base *Shafi* school of thought and the Courts decided the cases in the light of said school. The *Shafi* school considers the financial condition of husband when wife and husband differ each other in financial status.

3.3.5 Recommendations:

1. There is no legal provision explicitly defining or giving details in this context. Hence, a divorced woman's right to maintenance is subject to interpretation by Court of Law. Therefore, it is recommended that clear and explicit clauses should be incorporated in the section 9 of the Muslim Family Laws Ordinance 1961 to provide easy understanding of the subject and quick relief to the effected women.

2. It is an irrefutable fact that very often suits for maintenance (and other family suits also) takes years to get the issue decided by a Court of law and the woman remains a victim to innumerable glooms. In the special circumstances of our country where woman are generally not able to earn their livelihood, a wife's right of demanding dissolution of marriage conditioned with two years neglect or refusal in providing maintenance to her, requires sympathetic consideration. The wife should be provided a right to present a petition in a Family Court demanding parting in the event of husband's failure or overlooking without a just reason, prescribing a time-limit of six months. If the Court after consideration of the husband default for non-providing maintenance as well as his monetary conditions, comes to the conclusion that there are no suitable reasons for non-providing maintenance by the husband and he is also not poverty-stricken, it should, without delay, order for separation. If the husband is unable to provide maintenance to his wife due to his poverty and there be sufficient reason to believe that there is no possibility in the near future for his earring sufficiently so as to provide maintenance to wife, the Court should, without delay, order separation, especially when there

is an apprehension of wife going astray form the path of virtue due to husband's poverty. However, if there is a possibility for husband's earning enough to maintain his wife, he should be allowed proper time. If he does not prove his earnings, capability and eagerness to provide maintenance to his wife within the time allowed by Court, an order for separation should be passed by the Court.

3. Islamic law confers upon the wife the right of filing a complaint in Court if the husband neglects or defaults continuously in providing maintenance to his wife. The Court thereupon shall pass an order against the husband for payment of maintenance operating cost. If the husband, in spite of the order passed, fails to pay the maintenance amount; the Court is empowered to pass an order for the husband's imprisonment for a fixed period. Some of the jurists have agreed one month's imprisonment on account of non-payment of maintenance expenses and some others have specified the period of imprisonment to be three months. To this writer, one month's imprisonment is preferable. And if the husband, during detention, pays the maintenance allowance to his wife, he shall be set free, simultaneously.

4. In Pakistan's Family Laws, there is lack of legal provision on ‘divorced women’s right to maintenance. There is no provision for the entitlement of divorced women to maintenance during *iddat* or even past maintenance. Therefore, necessary legislation on the subject is recommended.

5. Lack of security mechanism for the protection of women from violence after divorce is direly felt as it has been observed that at times violence against divorced women by the former husband goes to such an extent that the people

providing support to them also becomes victim of violence. Therefore, legal provision should be developed to provide security of effected women and the people providing support to them.

6. Another serious problem is lack of legal provision for divorced women right to seek maintenance of her children. Since mother is not considered natural guardian, hence, there is no presumed right of her to seek maintenance for her children unless appointed by the court as guardian of children. It is recommended, therefore, to legislate on the subject problem to provide the divorced woman, maintenance for her children, also.

7. It is a fact that, in Pakistan, there is lack of mechanism for the enforcement of right to maintenance outside courts. In the absence of such mechanism, for every single case an aggrieved woman has to approach the court which is not feasible in the prevailing socio cultural and economic set up. Therefore, it is recommended necessary steps for ensuring the maintenance without approaching the Court should be taken through educating the general public and incorporation of the subject in the text books of suitable level.

End Notes:

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[1] Substituted by the Muslim Family Laws (second amendment) Ordinance, 1961 (XXX of 1961) S. 2 (Manan M.A. (1995) Muslim Family Laws Ordinance, PLD Publishers, Lahore, p. 4)

[2] This sub section was added to the Dissolution of Muslim Marriage Act 1939 in result of Muslim Family Laws Ordinance 1961 in the situation where a husband takes additional wife without the consent of previous one

[3] A man or woman reached to puberty

[4] A.I.R 1973 Gau. 56

[5]1992 MLD 219

[6] The amount of Rs. 500 was substituted for Rs. 100 by Code of Criminal Procedure (Amendment) Act, 1955 (XXVI of 1955)

[7] *Iddat* is defined by section 257 (2) of Muhammadan Law. It says that *Iddat* may be described as the period which is incumbent upon a woman, whose marriage has been dissolved by divorce or death to remain in seclusion, and to abstain from marrying another husband. The abstinence is imposed to ascertain whether she is pregnant by the husband, so as to avoid confusion of the parentage. When the marriage is dissolved by divorce, the duration of *iddat*, if woman is subject to menstruation, is three courses; if she not subject, it is three lunar months. If the woman is pregnant at the time, the period terminates upon delivery. When the marriage is dissolved by death, the duration of the *iddat* is four months and ten days. If the woman is pregnant at the time, the *iddat* lasts for four months and ten days or until delivery, whichever period is longer. If the marriage is dissolved by death, the wife is bound to observe the idda whether the marriage was consummated or not. If the marriage was dissolved by divorce, she is bound to observe the *iddat* only if the marriage was consummated; if there was no consummation, there is no *iddat*, and she is free to marry immediately (Mulla D.F, 1995, pp. 393-394). The *iddat* of divorce commences from the date of the divorce and that of death from the date of death. If information of divorce or of death does not reach the wife until after the expiration of the period, she is not to bound to observe any *iddat* (Baillie, p. 357).

[8] The consideration or object of an agreement is lawful, unless- it is forbidden by law; or

is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or

involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

[9] AIR 1946 Sind 48 : AIR 1941 Lahore 167 ; AIR 1949 Sind 48; AIR 1945 Peshawar 51 ; AIR 1943 Lahore 310 ; AIR 1943 Peshawar 73 ; AIR 1946 PAT.467; AIR1941 Sind 23 ; AIR 1942 Lahore 92 and AIR 1950 Sind 8

[10] Karachi Weekly Law Reports (Vol 2) No.29 1961 p. 65

[11] PLD 1954. Peshawar 13, (Muhammad Shafi. J)

[12] PLD 1963 Dacca 583 ; 14 DLR 465. (Idris J.)

[13] 9 PLD 1966 (W.P) Lahore 703 ; 19 DLR (W.P) 50

[14] PLD 1967 AJ & K 32 : 19 DLR (W.P) 104 (DB)

[15] PLD 1967 Lahore 1104

[16] PLD 1971 ; Lahore 866 ; Law Notes 1971 Lahore. 601 (DBI)

[17] PLD 1966 (WP) Lahore 703 ; 19 DLR (WP) 50 (DB) ; Law notes 1970 Lahore 479

[18] "*Pemberian*" means a gift whether in the form of money or things given by a husband to a wife at the time of marriage (Act 303, p.12)

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Chapter 4

Review of Laws Regarding the *Wilāyah* Nikah (Guardianship of Marriage)

4.1 Juristic comprehension of *wilāyah* and its objective: Meaning; literally, the term *Al-wilāya* (ولاية) means specifying a piece of land, authority, power and rage (Manzoor, 2001), and when it is pronounced as *al-walāya* (ولاية), then it stands for help, support and assistance as mentioned in Holy Qur'an [18:44]:

عيخ ب ا ا خيوا ه ولقالالله ط بالي ق ث

That is where the power of protection rests with Allah, the True God. He is the best in rewarding and best in requiting .

A renowned scholar of Arabic grammar *Sebweh* (d. 796 AD) stated that when it is used as *al-wilāya*, it acts like noun and when used as *al-walāya*, it stands for the infinitive (Al-Zubaidi, 2005).

In the view of *Ibn-e-Faris* (d. 1004 AD); anyone who stands and acts for anther one's matters, is called his *walī* i.e. guardian (Zakriyya, 1979).

In the terminology of *Shariah*, *al-wilāya* is defined as the right of a person for implementation of his order or choice, (over another man or human) whether the other one likes or dislikes it.

In the view of *Wahba Al-Zuhaili*;

it is now possible to say that alwilaya is the power of transaction for a man without depending upon the permission of another one, and the

man is called then motawalli Al-Aqad i.e the man having authority to

do transaction from the same meaning is the part of the verse 02:282 of holy Qur'an (Al-Zuhaili, 2002).

4.1.1 ***Types of Al-wilāya (Guardianship)*****:** According to *Hanafi* school of thought, there are three types of *Al-wilāya* ;

a. Al-wilāya over someone's self

This is the authority of *walī* concerned with the someone's self in the forms of protection refining ,training , education ,learning of skill and marrying him . this type of authority goes to father ,grandfather and other guardians gradually.

b. Al-wilāya over wealth and property

This is a kind of guardian ship related with the arrangement and custody of minor unable to execute transactions, spending and protection pf wealth. This *wilaya* is confined to father, grandfather and their legatee. Similarly the legatee of judge or Qazi has the right to guard the interests of minors.

c. *Al-wilāya over someone's self and property at the same time (together)*

This kind of *wilāyah* is concerned with the self and property or wealth of someone, this type is confined to father and grandfather only.

The *wilāyah* which is concerned to present research in the *Al-wilāya* over someone’s self, mentioned above at serial No.1; therefore this kind of *al-wilāyah* is explained in the following for the purpose of better comprehension.

The *Al-wilāya* over someone’s self is further divided into two kinds (Al-Hiskafi, 2006) which are as under;

i. **Compulsory *Wilāyah*:** In this kind of *wilāyah* consent and permission of ward has no authority, hence the *walī* or guardian can marry him or her to other, whether the ward likes this match or not, it is known as *wiālyah al-ijbār* i.e. compulsory and binding *wilāyah* over some one.

ii. Optional *Wilāyah*

This is the kind of *Al-wilāya* in which consent and permission of ward or subjected person is not involved, therefore, the guardian concerned, cannot marry him or her without proper consent or permission.

4.1.2 Aims of *wilāyah* (Guardian ship):

1. The feature of guardian in marriage process hold prominent significance as it is a tool of civilization. The human being learns from the expertise of seniors and experienced ones. The guardian, in shape of father or any close blood relative, has vast experience in day to day situations and making of decisions. The said feature provides a chance to benefit from the experience of the seniors.
2. Rationally, every individual is free to contract all kinds of transactions save the case of marriage, where guardian's consent is required or at least commendable. It points out the prominence and uniqueness of marriage deal as it happens almost once in life when the potential threat can lead to the failure of marriage knot as compared to routine transactions, which can be repeated time and again by individual.
3. It is the phase of age in which one is under the influence of emotions. This phase in not long lasting and durable because a man moves towards sanity with growing age, where he can reanalyze the decisions made in emotional phase of life being

good or timely. Here, a man may opt to wait for years to analyze his decision or trust those sane and sincere people who have experienced the hot and cold situations and challenges of life.

4. Another aspect of emotional age is that it is a timely period. If the decision was concerned with this period, it could be justified, but the marriage' case is concerned with the whole life, therefore, it could not be justified to ignore future life for a short period. Therefore, it demands proper pondering and consultation free from emotions.

5. It in an agreed principal of justice that a judge should act and decide while free from emotions, absolutely. As far as the situation of marriage in concerned, here a man or woman acts like a judge, therefore, he or she should be free from the influence of emotions. These emotions may be a result of beauty, wealth, status, education, same official posting, etiquettes, and mode of speaking. All these situations need a thorough analysis to ensure a peaceful, ideal and loving match.

6. Guardians, especially parents, have uncountable favours upon a man or woman. Moreover, they have a social status in the society and they expect and obedience from their wards. In case they are ignored or bypassed in selection of life partner, they may feel shock of disrespect. Thus, caring for the consultation and selection of guardians, is a type of respect and honor for them.

7. Marriage contract should be announced and made public enabling the society to know about their new match and to recognize their cohabitation as valid and legal. Hence, the marriage contract become distinguished from adultery, in which committers prefer concealment. It will be a good sample of announcement, where

guardian are present in ceremony of marriage.

8. Ignoring the advice and consultation of guardians points out the shortcomings, in the upbringing, education and training of wards. On the part of guardians, it will be a matter of disgrace and shame to be recognized as incompetent in the upbringing of their wards, while they have left no stone unturned in the training and education of their wards.

9. Guardian ship in marriage in the symbol of great casing having a noble status in Islam. It proves that Islam grant utmost preference for a successful marriage in its divine instruction.

10. The Almighty Allah has conferred superiority to some people over the others. This is just and rational as we experience it in our day to day life. For instance, in an organization, there will be administrative pyramid, someone will be chief executive while others will be directors, managers, foremen and workers. It is the basic need of an organization for smooth running. Similarly, the religion of Islam grants the features of responsibility and supervision to some people over the others in order to ensure peaceful living in a comfortable manner .

11. The Almighty Allah has preferred man over woman in the case of guardianship while contracting marriage. Men are ordered to become guardian of woman in contracting marriage as it is a deal in which woman feels shyness, naturally. Secondly, they have less interaction with general public as compared to men.

The condition or principle of *wilāyah* portrays two scales of Islamic jurisprudence which are as follows:

a. Caring for the public interest and good

b. Avoiding the harms and damage causing things

Based on these two principles, seeking the counsel of guardian leads to the fulfillment of public good and enable an individual to avoid harms.

12. Contracting a marriage is a transaction which require proper heed, caution and sanity because this contract has potential high intents and objectives. It should not be taken like other transaction of routine daily life which have limited intents. This contract bring a new generation in the result of cohabitation of a couple, which is a great objective in itself. Furthermore, the cohabitation of couple provides a safer and protective environment for the nourishment and training of new comers. Men as compared to women, have vast and expansive experience of worldly situation, therefore, man can play the role of marriage managers than women.

4.1.3 ***Grounds of Wilāyah and Different Opinions of Jurists about it:*** Defining the basic cause of *wilāyah*, the jurists have been differed in their opinions. The jurists belonging to *Maliki, Shafi* and *Hanbali* schools of thought , defined the cause of *wilāyah* as virginity (Al-Baihaqi, 2007), while according to *Hanafīs* and *Zahirīs*, the cause of compulsory guardianship is minority i.e. childhood (Al-Margheenani, 2008).

Hence, variety of juristic opinions provides a diverse judgment in the case of an adult sane and virgin girl. According to first school, the *walī* or guardian can force her for marriage without her consent or permission as they opined that cause of *wilāyah* is virginity . On the other hand, the second school i.e. *Hanafīs* and *Zahirīs* view that the cause of *wilāyah* is minority, therefore they consider forcing and compelling for marriage

without the girl's consent as unlawful.

However, *Hanafīs* and *Zahirīs* allow the forced marriage of minor girl or boy thanks to the cause of minority in the both of them. They also allow forced marriage in the case where the minor girl is widow or divorced or non virgin. On the contrary, *Malikis, Shafis* and *Hanbalis* consider forcing of non-virgin girl for marriage by guardian as unlawful because the cause of forced guardianship has been eliminated; which was virginity.

4.1.4 ***Conditions for forced Guardianship in Marriage:*** Jurists of *Shariah* have set some conditions for allowing forced guardianship in marriage in which the consent or permission of girl is not required (Al-Sharbeeni, 2003).

They are as under;

i. There should be no evidence of enmity, rivalry or detest between the *walī* and girl.

ii. The *walī* should marry her with a man of her equal status (*Al-kafa'a*)[1]

iii. The *walī* should marry her at the sum of dower (*Mahr*) equal to her peers from paternal side (*Mahr-e- Misal*).

iv. The dower should be the currency of current territory where the girl is residing.

v. The financial situation of husband should be good enough to pay the sum of dower to the girl.

vi. The husband should not be of such kind with whom living is considered difficult and uncomfortable e.g. an old man or blind etc.

4.1.5 *Opinions of Jurists in Wilāyah over an Adult, Sane and Free Woman:*

Deriving authorities from *Holy Qur'an, Sunnah*, sayings of Prophets' companions and rationale, Islamic jurists have differed in their opinions regarding the *wilāyah* over an adult, sane and free woman. The detail is as follows:

i. *Wilāyah* is a mandatory condition in Marriage: The first school of thought is of the opinion that contracting a marriage has an aspect of guardian's right therefore; an adult girl cannot transact marriage deal herself. Even if she contracts such marriage, this will be null and void. This is the opinion of *Malikīs, Shafīs* and *Hanbalīs* (Munzir, 2004).

ii. *Wilāyah* is not a compulsory condition in marriage of an adult, sane and free woman: According to this school an adult, sane and free woman can execute her marriage deal without her guardian, whether she is virgin or not .However, jurists belonging to this school term the seeking of *walī*'s consent as commendable . They also allow such kind of marriage if contracted with a man of equal status or inferior (this is called *kafa'a* in Islamic jurisprudence), but they grant right of objection to the *walī* in case of contracting marriage with a man of low status as it is the matter of shame and disgrace for the *walī* in community as well as in family (Al-Shaibani, 1997). This school is held up by *Abu Hanīfa* (d. 767 AD) and Z*ufar bin Hazail* (d. 775 AD).[2] It is the opinion of Ab*u Yousaf* (d. 182 H) as an evident authority attributed to him.[3] It is also narrated that *Muhammad Al-Shaibanī* (d. 805 AD) adopted this opinion later on.[4]

This school of thought which grants permission to an adult, sane and free woman or girl to contract her massing without the consent of her *walī* or guardian, is attributed to the *Hanafi* school of thought, therefore, this is explained briefly in the following.

Actually, *Hanafīs* differed in this opinion among themselves as the founder of the school *Abu Hanīfa* (d.167 AD) has been reported with two narrations in such marriage.

a. Firstly, he allows the marriage of an adult sane and free woman or girl without any conditions. Nevertheless it is considered non commendable. This is apparent and famous viewpoint of *Abu Hanīfa*.

b. Secondly if such marriage contracted with a *kof'w* (man of equal status), he allows that otherwise he does not. This opinion is represented through his disciple *Hassan bin Zeyād* (d. 819 AD). *Imām Abu Yousaf*, a prominent jurist of *Hanafi* school and Chief Justice (*Qazi al Quzāt*) during *Abbasids*, expressed three opinions in different times;

   i. Firstly, it is not allowed definitely, if *walī* is present

   ii. Secondly he inclined to the opinion that it would be allowed if contracted with a *kof'w* (a man of equal status)

   iii. Thirdly , he adopted the opinion of allowance without the restriction of *kof'w*

Another great jurist *Imām Muhammad* had communicated a couple of opinions;

a. Its taking place will be dependent upon the approval of *walī*, however if marriage is contracted with a *kof'w* and the *walī* declined to approve it the marriage will be endorsed by the *Qazi*.

b. Secondly, he inclined to the popular standpoint of *Hanafīs*, which is the allowance of the marriage without any restriction.

Hence, these three major personalities of *Hanafi* school are agreed on the allowance of the marriage of an adult, sane and free woman or girl at her free will.

iii. Compatibility and Equal Status of the Husband (*Kafa'a*): Third school of jurists states explanation in justifying the status of marriage with or without the consent of guardian or *walī*. Their opinion is based on the compatibility (*Kafa'a*) of the husband i.e. whether or not he possesses compatibility, similarity and equal status to his wife. Therefore marriage of a free sane and qualified girl with a man, herself, will be justified and implementable if the husband enjoys the status of *kafa'a*. On the other hand, marriage with a man lacking *kafa'a* to his wife will be considered as null and void. This school has been adopted by *Hassan bin Zeyād Al-Lululawi* [5] (d. 819 AD) and attributed to *Imām Abu Hanīfa* (Ibn-e-Humam, 2001). It is also one of opinions expressed by *Abu Yousaf*, however, it is stated that he retracted this opinion and adopted one of the following two opinions;

a. The marriage of an adult, free and sane girl, by herself, is permissible without the condition of *kafa'a*. It is his popular stance with is narrated in the first school of juristic opinions.

b. The marriage of an adult free and sane girl herself is not permissible without the consent of *walī* .This opinion is attributed to him by *Tahawi*[6] [d.321 H] and *Imām Karkhi* [7] [d.340 H] (Al-Tahawi, 2008).

iv. Dependency upon the Approval of Guardian: Fourth school among the jurists terms the marriage of an adult free and sans girl, by herself, dependent upon the approval of her *walī* in principle. The supporters of this school allow a competent girl to conduct marriage by herself but they add condition of *walī's* approval to end the

suspended status of such marriage. They do not consider the *Kafa'a* of husband for validity of the marriage also, rather they depend the fate of marriage in both situations upon the sanction of *walī.* This opinion had been supported by *Muhammad bin Hassan Al-Shaibani* [d. 804 AD] (Al-Sarkhasi, 1989). Moreover, it is attributed to *Abu Yousaf* as one of his opinion in *Ahkam-ul.Quran* by *Abu Bakar Al-Jassas* [8] [d. 370 H] (Al-Jassas, 1998).

v. Distinction between the Authorized and Unauthorized Woman or Girl: The fifth school regarding the marriage of an adult free and sane girl herself describes difference between the girl authorized to do so by her *walī* and vice versa. This school allows and implements the marriage of a competent girl authorized by her *walī.* While the unauthorized girl cannot execute her marriage deal, even if she executes such deal, this will not be implemented and will be considered as void. This is the opinion of *Imām Abu Thaur* [9] [d. 854 AD] (Asqalani, 2009).

Distinction between the opinion of *Imām Muhammad bin Hassan*, mentioned in fourth school, and the current opinion, is that the current one describes the authorization and consent of *walī* before the agreement of marriage while the former one allows marriage after it has been taken place, provided that, approved by *walī.*

vi. Distinction between Virgin and Non-virgin Girl: The sixth school distincts between a virgin and a non-virgin (previously married) girl. According to its detail; the marrying of a competent virgin without the approval of her *walī* will not be justified and in case of non-virgin woman her marriage will be justified if she has authorized anyone among Muslim men to contract her marriage deed provided that her

walī has no objection over this marriage deed. This opinion is supported by *Imām Daud Zahiri* [10] [d. 884 AD] (Hazm, 2002).

vii. Nobility of the Girl's Family: According to the seventh school distinction between a noble girl[11] (having a gentle family background) and a less noble girl (having a mean family background) should be considered in the situation of marriage executed by herself without the consent of *walī. Imām Malik* supports this school with the detail that a girl belonging to a noble family cannot execute her marriage deal without her *walī*'s consent and on the other hand a girl from less noble or mean family can authorize any one among pious Muslim men to contract her marriage, even she can authorize her prospective husband. This is the famous and popular point of view attributed to *Imām Malik* (Asqalani, 2009, p. 194).

This school allows the marriage of a competent girl belonging to a low family background, however it has added two conditions to such agreement;

a. She can avail this option if her first *walī* (*walī mujbir)* is missing in such situation. And, if so, then she can authorize anyone from pious Muslim men to contract her marriage if first *walī* (i.e. father, in case of a virgin girl) is present, she cannot authorize any one for contracting this deed (Al-Dasauqi, 2002).
b. Secondly, she cannot contract her marriage herself or through any woman rather she must authorize a man among Muslims (Bar, 1992).

4.2 Comparative Study of the Laws of *Wilāyah*

4.2.1 Situation of Pakistan Regarding the Consent of *Walī* in Marriage:

Muslim Family law ordinance 1961 does not state any provision regarding the mandatory status of consent of *walī* as pre-requisite in the marriage of a *sui juris* girl. However, it has appointed the age of girl as 16 years and the age of boy as 18 years for eligibility of marriage (MELO, 1961).

Majority of Pakistan People follow *Hanafi* School, therefore pr-requisite of *walī*'s consent is not considered in marriage as per opinion of *Abu Hanīfa*, the founder of *Hanafi* School. Instead, other jurists and founders of concerned schools e.g. *Imam Shafi, Imam Malik* and *Imam Ahmad* possess the opposite opinion, but these schools are not followed in Pakistan, generally. As far as the case of *Shia* Population is concerned, they hold the same view of *Hanafi* school without any pre or post condition.

The Honorable Courts of Pakistan have decided and explained the status of consent of *walī* in their learned decisions from time to time. In *Muhammad Imtiaz vs State,*[12] the Federal Shariat Court of Pakistan allowed the appeal of appellants who were sentenced by the lower Court in the result of the FIR (First Information Report) lodged with local police by the father of Ms. Muhammad Jan under section 10(2) of Zina Ordinance 1979. The convicted couple filed appeal to Federal Shariat Court, which withdrew the sentence and validated their marriage. It is noteworthy that there was ample proof of girl's age as 19 years and marriage was duly registered under MFLO 1961.The bench of Federal Shariat Court was consisted upon the following learned judges;

Justice Aftab Hussain (Chairman)

Justice Karimullah Durrani (Member)

Justice Muhammad Siddiq (Member)

Justice Zahoor ul Haq ` (Member)

Justice Pir Karam Shah (Member)

Justice Malik Ghulam Ali (Member)

Justice Muhammad Taqi Usmani (Member)

The learned Lahore High Court, in *Hafiz Abdul Waheed vs Asma Jehangir* [13] case, held that marriage contracted without the consent of *walī* is not invalid as per decision of majority of judges. The bench was constituted upon three learned judges namely; Justice *Malik Muhammad Qayyaum,* Justice *Khalil ur Rehman Ramday* and Justice *Ihasn ul Haq Chaudhry*. The former two learned judges declared the marriage under question as valid while the later learned one wrote his decision in against to the former ones. In this case the marriage was solemnized without the consent and approval of girl's *walī*, the girl's father namely, *Abdul Waheed* filed petition in the honorable Lahore High Court. The learned Court issued its order on March 10th 1997 and validated the contracting of marriage by a *sui juris* girl without the consent of *walī*.

The Honourable Supreme Court of Pakistan, in *Hafiz Abdul Waheed vs Mrs., Asma Jehangir* and another held that consent of *walī* is not required and a *sui juris* Muslim female can enter into valid marriage or *Nikāh* of her own free will. The Honorable Court dismissed the appeal [14] and declared that marriage in the said appeal is not invalid on the ground of absence of *walī*'s consent.

The learned Court remarked that the parties (Appellant and respondent) can seek negotiation as to existence and validity of marriage from the competent Court under the

law of marriage. This judgment was issued by a three member bench, comprising of *Justice Mian Muhammad Ajmal, Justice Sardar Muhammad Raza Khan* and *Justice Karamat Nazir Bhandari*.[15]

The honorable Lahore High Court declared that a competent adult girl has the right to contract her marriage freely. The father of *Sughra Mai* challenged the marriage of her daughter on the ground of *Kafa'a* i.e. compatibility or equal status. He also registered criminal cases against her and her husband but the learned Court dismissed them and rejected the challenge on the ground of *Kafa'a* and validated the marriage of *sui juris Sughra Mai* .[16]

Hence it is evident from the above judgments of respectable Courts that a *sui juris* female possesses the right of contracting her marriage at her free will with or without the consent of *walī.* This is also clear that ground for this stand point is the opinion of *Imām Abu Hanīfa,* therefore, its established that consent of *walī* is not a prerequisite in contracting marriage with in Pakistan.

4.2.2 Situation of Malaysia: As compared to Pakistan, Malaysian Muslims follow *Shafi* school, therefore, they consider the consent and presence of *walī* as compulsory component of the marriage deed.

According to article No. 13 of Islamic Family Law Act 1984 (Act 303), such kind of marriage which is contracted without the consent of parents and *walī* of the woman, shall not be recognized nor registered. If there is no *walī* of woman form lineage (*Nasab*), then *Shariah* Judge of the locality, where the woman resides, will act as *walī raja.*[17] Moreover; *walī* raja can act in this capacity if *walī* is missing or the *walī* refuses his consent without sufficient valid reason (Malaysia, 2006, p. 16).

a. Requirements for the *Walī* : Act 303 of Federal Territories does not describe the necessary features for a *walī* under the instruction of *Shariah*, however, these features can be derived from the books of *Shafi* school. These features include similarity in religion, puberty, having sound mind and being a man. Some jurists have added the condition of justness (*Al-Adalah)*.

When the topic under discussion is referred to Kelantan Islamic family law Enactment 1982, it shows that required features or qualities for the eligibility of a *walī* have been described very clearly. They are as under:

i. A Muslim
ii. A Man
iii. Reached to age of puberty (*Baligh*)
iv. Acting voluntarily not under duress
v. Not in the *ihrām* of *Hajj* or *Umrah*
vi. Not a *Fāsiq* (Reprobate Person)

vii. Having a sound mind

b. Order of Priority of a *Walī*: A nearer relative gets priority over the farther one in appointment and selection of a *walī* as per teachings of *Shariah*.

According to the Shafi school the order of priority for the appointment of *walī* is as follow.

i. Father,

ii. Grandfather from father side, then great grandfather if both are present, then nearest will get preference.

iii. Full brother from same father

iv. Son of the full brother

v. Son of the brother from same father.

vi. Full paternal uncle (from same father and mother)

vii. Paternal uncle from same father

viii. Son of full paternal uncle

ix. Son of paternal uncle from same father

x. Full paternal grand uncle (From same father and mother)

xi. Paternal grand uncle from same father.

xii. Son of full paternal grand uncle (from same father and mother)

xiii. Son of Paternal uncle from same father

xiv. Full great grand uncle (From same father and mother)

xv. Great grand uncle from same father

xvi. Son of full great grand uncle (From same father and mother)

xvii. Son of great grand uncle from same father

xviii. Ruler, King or Sultan

The Kelantan Islamic Family Law enactment 1983, forth schedule has described the above priority order which is in accordance with *Shafi* school of thought (Ibrahim, 1998, p. 183).

4.2.3 Court Decisions Regarding the consent of *Walī:* The Malaysian Courts have decided cases regarding the consent of *walī* as per *Shafi* School of thought in result of the appeals lodged to them. Some examples are as under:

i. A marriage was annulled on the grounds of contracted by farther *walī* while the nearer one was present. A man appealed to Court in the jurisdiction of Federal Territories and prayed that he had acted as *walī* in contracting the marriage of her sister; while a nearer *walī* (who was their grandfather) was present. The appellant sought the annulment of marriage on such ground. The Learned Court held that; at the time of marriage the grandfather was alive and was able to act as *walī* therefore marriage has not fulfilled the necessary *Shariah* guidelines and has been annulled. [18]

ii. The case of *Hussain V. Saayah and Nor* which took place in Perils, the appellant prayed to the honourable Court that his daughter has contracted marriage without his consent in Thailand, therefore, he demanded for the annulment of this marriage. The marriage was solemnized before a Muslim religious scholar (*Lebai*) rather than *Qazi* in Thailand and consent of father (*walī*) was missing. The Court annulled the marriage and ordered separation between the couple with remarks that if there is no *walī* or *walī* refuses to give his consent then the consent of *walī*

raja should be sought. The Court referred to the traditions of Prophet (SAW) and held that there is no evidence of refusal of consent from the father (*walī*). Even if the father (*walī*) had refused to show his consent, the couple could have applied to the Courts to obtain the consent of *walī raja.*[19]

iii. The Sate of Kedah is located along the boundary of Thailand. A marriage was contracted in the nearby town of Thailand without the consent of father (*walī*). The girl and her father were resident of Kedah. When the case was approached to the Court the Chief *Qazi* of Kedah, he held that distance between original residence and solemnizing place is less than required for becoming a passenger under *Shafi* school (which is two *marhala*), therefore the marriage was annulled as it was possible to seek the consent of *walī.* The Court ordered separation between the couple and directed the woman to wait for the probationary period [*Iddah*]. [20]

Other similar cases which were reported include *Zakaria V Maria*[21] and *Saad V Sarima*.[22]

4.2.4 Findings

After describing the laws regarding the consent of *walī* in marriage, the comparison of two countries is presented. Majority of Pakistan people follow *Hanafi* school of thought as compared to Malaysia where majority of Muslims belong to *Shafi* school of thought. Therefore, related legislation and Court decisions are inspired by the specific school of thought followed by population of each country.

As far as the situation of Pakistan is concerned, the consent of *walī* is not a mandatory condition in contract of marriage and Honorable Courts of Pakistan did not consider this condition in validation of marriages contracted by a competent girl herself. The Federal *Shariat* Court of Pakistan, which has the mandate of reviewing any law whether or not it is repugnant to Islam, has issued its judgment in *Muhammad Imtiaz v. The State* [23] that a woman can marry at her free will without any duress. This judgment is the clear evidence of *Hanafi* School of jurisprudence.

On the other hand, the situation of Malaysia is totally different from Pakistan. Article No. 13 of Islamic Family Laws (Federal Territories) 1984 Act 303 describes consent of wedding couple as well as consent of *walī* as a mandatory feature and a pre requisite of marriage. Even if there is no *walī*, the state will appoint someone as the *walī* of the wedding woman, known as *Walī Raja*, who will marry the woman under the specified procedure.

Similarly, the Malaysian Courts issued judgments in which marriages contracted without the consent of *walī* have been annulled. These decisions obviously discloses that they are inspired by *Shafi* School.

Major finding in the above mentioned Law of both countries is the tapering of rigidity in the *Hanafī* and *Shafī* Schools. The Malaysian Law describes that if *walī* does not give his consent, then the woman can approach to the Court for the appointment of *Walī* Raja. This Law prevents the undue dependency upon the consent of *walī* in a situation where *walī* hesitates to grant consent without any solid reason or he compels the woman to marry against her own will, the woman is not bound to act against her will. The flexibility in Law safeguards the interests of woman and avoids blind duress from guardians.

Whereas the situation of Pakistan is related, a woman can marry without the consent of *walī* but the importance of guardian's consultation is underlined to avoid any unpleasant situation in the future.

In *Hafiz Abdul Waheed v. Asma Jehangir* [24], the Honorable Justice of Lahore High Court, Mr. *Khalil-ur-Rehman Ramday*, underlined the significance of seeking guardian's consultation and admitted it as his right. Furthermore, the learned judge brought on the record that children should obey their guardian in letter and spirits. The view of learned judge bring balance between the freedom to marry without *walī*'s consent, and moral as well as social duties of the children. It means that an adult girl, having sound mind can contract her marriage at her free will, rather, it will be better to consult her guardians because doing such tasks without the proper consultation and consent of guardian can lead to unpleasant incidents in future at one hand, and, earn a bad name for the family in society, on the other. Similarly, executions of such contracts by the woman are against the established norms of morality in Eastern society.

Hence, it could not be deduced from the opinion of *Hanafi* School that it allows runaway, secret and surreptitious marriage, rather, it should be treated as leave to be availed in unavoidable situations.

4.2.4 Recommendations:

It is evident from the study of Family Laws of both countries that law situation regarding the *alwilāya* in Pakistan is more women friendly than its sister country of Malaysia. However, it is pertinent of mention that the following of *Hanafi* school does not imply justification for secret, runaway and Court marriages. The emphasis of *Hanafi* doctrine is that the girl cannot be forced to a certain restricted choice. The girl has the final authority to accept the proposal or reject it at her free will. But this does not mean that she should step out of her parental home in search of her future life partner, mixing with men and then selecting one of them. The recommended way for ensuring the consent of the girl or boy in matters of marriage is that the parents and elders should do the search according to the requirement and preferences of the boy or girl and then report it to them who should have the final choice in that matter (Mansoori, 2009, p. 64).

1. It is recommended in this regard is the bringing of awareness in the people through educating parents as well as children to know their rights and duties. Thus, they will be able to balance their freedom and compulsion.
2. It is further suggested to legalize necessary legislations by the legislature to curb the menace of runaway and secret marriages which sometimes results in the crime of honor killing. The incidents of honor killing in love and runaway marriages through eloping of girls with their friends also indicate that our social and moral norms are against them and they are not tolerated in some regions. Therefore, the option should be used in the situations where interests of the marrying parties are in danger.

End Notes:

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[1] Literally the word *kafa'a* means equality. Generally, the two persons are called *kofw* (equal) of each other who are Muslims, have the same lineage, are free and are equal in profession, opulence and character. The desirable objectives of marriage, such as enjoyment of cohabitation, society and friendship cannot be completely achieved except b persons who are each other's equals, as a woman of high rank and family would abhor the society of and cohabitation with the man who is not here social equal. It is therefore, requisite that husband should be the equal of his wife (Rehman (1978), Tanzil ur, A code of Muslim Personal Laws, Karachi, pp. 199-200).

The law about equality in marriage seems to have been based on some practical difficulties experienced in unequal marriages. It is stated by *Al-Kasani* that many jurists such as *Malik, Karkhi, Hassan Al-Basri,* and *Sufyan Al-Thwari* do not accept this rule as correct, They rely upon following precedents in support of their opinion;

(a). Bilal (RA), a liberated slave, was married to an Arab girl (b). The prophet (SAW) has said that an Arab has no precedence over a non-Arab (c). The prophet (SAW) and his companions did not follow this rule (*Al-Kasani* (1995*), Ala ud Din Abu Bakar, Bidai wa Sanai*, Cario, p. 317, v. 2)

However, this cannot be denied that social equality in marriage in certain respects is essential to be happiness of the spouses. In some Muslim countries, equality in marriage in certain respects is still considered of great importance. Age is not the criterion in determining the equality in marriage in traditional customary law, so the learned Lahore High Court held the husband being of advanced age is of no consequences (*Sahazada Begum vs. Abdul Hamid*, PLD 1950, Lahore, 504). The doctrine of *Kafa'a* is of complex nature, so it is difficult to follow strictly some of the rules laid down by Muslim jurists on this subject, because some the grounds on which a marriage was considered unequal in the past have now lost their significance. E.g. not much importance is attached to lineage and one comes across a case in which a girl belonging to noble family has been married to a man belonging to less noble family. The evolutionary process of human society modified the norms of culture and now a days equality in intellectual level i.e. education has gained more importance.

[2] *Al-Kasani* (1995*), Ala ud Din Abu Bakar, Bidai wa Sanai*, Cario, p. 1364, v. 3

[3] *Fath Al-Qadeer*, p. 256, v. 3

[4] Ibid

[5] Abu Ali Hassan bin Zeyad Al-Luluawi Al-Kufi (d. 819 AD), a prominent disciple of *Imām* Abu Hanifa, belonged to Iraq (Elaam Li Zarkali, p. 191, v.2)

[6] He is *Abu Jaffar Ahmad bin Muhammad bin Salama Al-Tahawi* (d.321 H), one of the prominent Hanafi Scholars (ar.wikipedia.org/wiki retrieved on Feb 10,2013)

[7] *Abu Al-Hasan Ubaid ullah bin Al-Hussain bin Dallad Al Karkhi Al-Baghdadi*, A Hanafi Jurist from Iraq (www.Islamweb.com retrieved Feb 10, 2013)

[8] *Abu Abullah Al-Hussain bin Abdullah bin Al-Jassas Al-Baghdadi,* (*Al-Zahabi (2001), Muhammad bin Ahmad bin Usman, Siyar A'lam un Nubala,* Moassisa Al-Risala, Beirut, p. 496, v. 14)

[9] Ibrahim bin Khalid bin Abi Yaman Al-Kalabi Al-Baghdadi, Abu Thaur (Islam select.net/mat/mat/88177 Retrieved Feb 10, 2013)

[10] Daud bin Ali bin Khalaf Al-Zahiri Al-Baghdadi (816-884 AD) wikipedia.org/wiki/داود الظاہری

[11] A girl from noble family is explained as honorable girl having a sum of wealth and place in society and most of people have inclination to marry her due to her lineage or ancestry or wealth or beauty (*Al-Sharh Al-Kabir wa Hashia Al-Dasauqi*, p. 226, v. 2).

A compared to the girl from noble family the girl belonging to a less noble or mean family lacks the features of the former e.g. a black coloured or newly converted or freed recently

However researcher and scholars have objected over the examples of the mean family s girl as a general slue because every black colored or newly converted to Islam or freshly freed girl cannot be considered as less noble. It has been observed that some people have inclination towards thin for arraying therefore, mean or less noble family can be defined as strange non popular being poor and ugly (*Al-Sharh al-Kabir wa Hashia Al-Dasauqi*, p. 226, v. 2; *Hashia Al-Bannani Ala Zarqani*, p. 176 v. 3).

[12] *Muhammad Imtiaz vs State,* PLD 1981 Federal Shairat Court 308

[13] PLD 1997 Lahore 301

[14] Criminal Appeal No 98 of 1997

[15] PLD 2004 Supreme Court 219

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[16] PLD 1980 Lahore 386

[17] *walī raja* means a *walī* authorized by the Yan Di-Pertuan Agong, to give away in marriage a woman who has no *walī* from lineage [*Nasab]*

[18] *Ismail V Aris Fadillah* and *Anor* 1980 5th 326

[19] (1980)7th 35

[20] (1999) 5th 106

[21] (1977)3Jh 97

[22] (1992) 9th 203

[23] PLD 1981 FSC 308

[24] PLD 1997 Lahore 301

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Study of the Laws Regarding Guardianship

5.1 Meaning of Guardianship (*Ḥaḍānah)* and its kinds

Right of custody means the caring and protection of the child in the case where husband and wife separates through dissolution of marriage or death of any one. In the *Hanafi* school, the right of custody is mandated for the mother initially. The male child will remain in her custody up to seven years of age and female child will remain in her custody till the age of puberty. The Holy Qur'an does not mention the above mentioned detail rather we can find implied meaning in various verses which are concerned with the nourishment of children.

The Holy Qur'an says [02:233];

Mothers (should) suckle their children for two full years, for one who wants to complete the (period of) suckling. It is the obligation of the one to whom belongs the child that he provides food and clothing for them (the Mothers) with faculty. Nobody is obligated beyond his capacity. No mother Shall be made to suffer on account of her child, nor the man to Whom Belongs the child, on account of his child.

Likewise responsibility (of Suckling) lies on the (one who may Become an) heir (of the child). Now, if they want to wean, with mutual consent and consultation, there is no sin on them. And if you want to get your children suckled (by a wet-nurse), there is no sin on you when you pay off what you are to give with faculty, and fear Allah, and be assured that's Allah is watchful of what you do .

This verse describes the time period for the breast feeding of a child during fosterage. At another place, the Holy Qur'an mentioned the time frame for breast feeding as two years.

The holy Qur'an describes [31:14];

انہومم ہحلتہ يدلابناس ن ايـنصوو اعِف ھناصِوفو

لِ رْ اشن أنْي

هيِ ما لِاكيدِلاو لو

We commanded man (to be good) in respect of his parents. His mother carried him (in her womb) despite weakness upon weakness, and his weaning is in two years. (We said to man,): Be grateful to Me, and to your parents. To Me is the ultimate return. [31:14].

During this period, the mother should feed their babies and the mother will get preference in the right of fosterage even after dissolution of marriage bond.

There is another verse which directs us with more information. [65:07];

A man of vast means should spend according his vast means. And anyone whose sustenance is limited should spend from whatever Allah has given to him. Allah Makes no one liable beyond what He has given to him. Allah will soon bring ease after difficulty.

As per above mentioned verse, the divorced woman will get preference in fosterage of her child over strange woman if she is willing to do so. The husband will pay for the service of fosterage to his ex-wife. If the conflict between the couple rises to a certain degree which makes impossible the mother's fosterage, then any other woman can be engaged for fosterage either with or without payment. The objective of this commandment is the protection of the rights and privileges of both father and mother. The mother cannot claim any undue remuneration for feeding the child and provide safety to the father if he does not wish to feed his child from his mother for health related reasons.

Determining the preference of mother over father in the right of custody, the afore said verses provide authority, and there are many Prophet's traditions (SAW) which serve the same objective.

قأم الل ... ء القع ... وأ ن لق م ه ب عل ا و ي وا دلة

، للا رسو يب ... وعاء هل ن ط بن

هذ ن ابنا ... هل ي د

ل ... فق

ث

ر ... وه ي ع ... أحق ك ح تن ل

لوس صّ ... أن"خ لس لم ه ب

ل ل

ل ل

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A woman reported to Prophet (SAW) that once upon the time when her abdomen was the home of her son, her breast was his feeding point and her lap was his cradle. But now his father has divorced me and wishes to take him from me. The Holy Prophet (SAW) ruled that you

are more deserved for the custody of child until you remarry (with someone else) (Sajistani, 2006).

In another case, *Hazrat Umar* (RA) divorced her wife *Jamila bint Thabit* and intended to take his son *Asim* from her. The case was reported to *Hazrat Abu Bakar* (RA), who ruled that mother's lap is better than him i.e. Umar [RA] (Gangohi M. H., 2005, p. 181).

The prominent Muslim scholar, *Allama Margheenani* (d. 1196 AD) commented on the aforesaid ruling of *Hazrat Abu Bakar* (RA) as the mother is more kind to the child than father and she has more competency of upbringing the child. *Hazrat Abu Bakar* (RA) implied to this point while issuing his ruling. He said to *Hazrat Umar* (RA): “O” Umar: mother’s spittle is better than your honey in the favour of this child (Diraya, P.434, vol:2). When *Hazrat Abu Bakar* (RA) issued this ruling, a large number of Prophet’s companions were alive and observed the event but they did not differ with him. This feature underlined the significance of the said ruling, and mother’s right will be preferred, generally.

Allama Margheenani further posited as; in custody of a male child the right of mother and maternal grant mother will be preferred until the child learns to eat, drink and urinate, separately, without the assistance of someone else. The reason is that when the child become able to dispense these Action, separately then he need to learn etiquettes and manner of manhood. In this regard, father’s role is more effective than the mother’s (Margheenani, 1999, p. 435).

Now the question arises that what will be the age of child to reach to such degree of doing these Actions without the assistance of other and how this certain age will be determined?

Another *Hanafi* Jurist, *Abu Bakar Al-Khassaf* (d.261 H) has determined such age as seven years, which is a dominant opinion according to him (Margheenani, 1999, p. 435). As far as the case of female child is concerned, *Allama Margheenani* comments that the custody's right of mother and maternal grandmother will be preferred till the girl reaches to the age of menstruation because the girl is in need of mother and maternal grandmother for learning etiquettes and manners related with women. But after menstruation and reaching to puberty, she will be in need of protection of her honour. In this regard, the father has more competency than her mother and grandmother (Margheenani, 1999, p. 435).

The age of menstruation and puberty differ in respect of girls. Some girls reach to it in early age while others slightly or more late. Therefore, determination of a specific age is against the rationale as age of puberty change with each and every girl. The *Hanafi* Jurists differed among themselves in determination of age in respect of female child. They described opinions of nine and eleven years, however, the opinion of nine years is preferred, whether the custodian is mother or someone else (Al-Kharashi, 1307 H, p. 184).

For giving different opinions in case of male and female child as seven years for the former one and age of puberty for the later, the *Hanafi* Jurists commented that, as per analogical reasoning, the age limit for male and female child should be the same as

determined the age of seven years in the light of tradition of *Hazrat Umar* (RA) and his wife *Jamila bint Thabit*, and analogical reasoning was given up. However, there is no tradition in respect of female child, so it was retained in the same position (Gangohi, 2005). The *Hanafi* jurist do not allow option of choice for male and female child before puberty in the case where parents differ upon custody of child because it is against the rationale in their view (Amr, 1998).

According to *Malikī* school of thought, the time limit for male and female child slightly differ from each other in terms of reference. The *Malikī* Jurists are of the view that custody of mother will be effective till the puberty in the case of a male child. While on the other side, the custody of mother in respect of female child will reach to its end with the consummation of husband with the girl after her marriage, where the mother was divorced or widowed. Until the marriage bond persists between the couple, both have equal right of custody of children (Al-Dardeer, 1997, p. 755). It is clear from the study of their respective school that there is no option of choice in *Malikī*'s opinion as the custody period is extended up to puberty and there is no need of custody after puberty in respect of male and consummation in respect of female child.

Whereas the school of *Shafīs* is concerned, they have not set the maximum limit of custody period. They are of the view that a child should remain in mother's custody till the age of discretion to choose between one of his parents. They opined that there is no specific end limit of custody period and the child will be given option of choice where the conflict between the parents arise. As far as the age of discretion is concerned, it can be earlier than seven years and later than eight years, thus the matter will be decided by the

judge or *qazi*, who will hand over the child to one of parents upon his or her choice (Al-Sharbeeni, 1997, p. 457).

As per the school of *Imam Ahmad bin Hanbal*, the period of custody will end with the age of seven years for both male and female child. After that the child will be given the option of choice to select one of his parents (Al-Shokani, 1993, p. 371).

According to *Imamiyya* school of thought, the end limit of custody's period is the age of two years in respect of male child and seven years in respect of female child. After this initial information, the said school adds that female child will remain in the custody of father to complete the age of nine years and male child will remain up to the fifteen years. After reaching to respective ages of nine and fifteen years for female and male child, they will be provided with option of choice to select any one of parents (Mughniyya, 1964, p. 96).

From the above mentioned detail of Juristic school, it comes clear that *Shafīs* and *Hanbalīs* give the option of choice with reaching to age of discretion and seven years, respectively. While on the contrary, the *Hanafīs* and *Malikīs* do not give option of choice till the age of puberty but differ in case of male child in preference of custodian. The *Hanafīs* view as the father will be preferred and *Malikīs* view as the mother will be preferred. While the *Imamiyya* school is of the view that male child will remain with father till the age of fifteen years, then he will be given the option of choice.

The Muslim Jurists also differed in the order of the more entitled person for the custody of a children. In the view of *Hanafi* Jurists the order of entitle ship will be as under (Al-Jaziri A. R., 2003, p. 520);

1- Mother
2- Maternal grandmother (and so on in ascending order)
3- Paternal ground mother (so on in ascending order
4- Full sister
5- Half sister From same mother
6- Half sister from same father.
7- Daughter of full sister
8- Daughter of half sister from same mother
9- Daughter of half sister from same father
10- Maternal aunt.

In the situation, where no relative from the above mentioned list is found, the order of entitle ship then shifts to father side in following serial:

1- Father
2- Grand father (so on in ascending order)
3- Full brother from same father and mother
4- Half brother from same father
5- Nephew from full brother
6- Nephew from half brother of same father.
7- Full paternal uncle
8- Half paternal uncle from same father

In the opinion of *Malikī* school, the order of entitle ship will be as follows (Al-Jaziri A. R., 2003, p. 521):

1- Mother
2- Maternal grand mother
3- Full maternal aunt
4- Half maternal aunt from same mother
5- Mother's maternal aunt
6- Mother's paternal aunt
7- Paternal grand mother
8- Mother of paternal grand mother
9- Mother of paternal grandfather.

In the situation, where no relatives from the above order is present, then the order of entitle ship will transfer to the father's side with the following detail:

1- Father
2. Sister
3. Paternal aunt
4. Paternal aunt of father
5. Maternal aunt of father
6. Niece from half full brother
7. Niece from half brother (same mother)
8. Niece from half brother (same father)
9. Niece from full sister

The *Shafi* Jurists have the determined the order of entitle ship on the basis of classification in the relatives. They classified the relatives in to three group with the following detail (Al-Jaziri A. R., 2003, p. 521):

Group No. 1: In this group those relatives have been selected which are combination of men and woman.

Group No. 2*:* This group is consisted relatives which includes only woman.

Group No. 3: This group is consisted upon only men relatives.

In the case of group No. 1, mother will get preference over father, then maternal great mother, then father, then paternal grandmother, and then mother of paternal grandmother.

In case where no relative from above mentioned relatives is found, then female nearer will be preferred over the less nearer from the combination of group No. 1 relatives.

In the absence of on these relatives, the male nearer ones will be preferred over the less nearer from group No. 1, with the criteria of preference for female side over male side, e.g. maternal aunts will be preferred over paternal aunts.

In the case of group No. 2, in which only women relatives are included, the mother will be more entitled for custody of children, then maternal grandmother (so on in ascending order), then sister, then maternal aunt, then niece from Sister, then niece from brother and then paternal aunt.

The detail of preferring in the same degree of relevance, the full relative will be preferred from the half relative from father side and then half relative from mother side.

In the case of group No. 3, in which male relatives have been included, absolutely, the preference will be given to father, then grandfather, then full brother, then half brother from same father, and then the niece from same father and then the niece from full brother and half brother from same father, respectively.

The *Hanablīs* are of the view that mother has first right of custody with the following order, subsequently (Al-Jaziri A. R., 2003, p. 521):

1. Mother
2. Maternal grand mother
3. Mother of maternal grandmother (and so on)
4. Father
5. Paternal grandfather (and so on in ascending order)
6. Paternal grand father
7. Mother of paternal grandfather (and so on)
8. Full sister.
9. Half sister from same mother and them from same father
10. Full maternal aunt
11. Half maternal aunt from same mother and then from same father
12. Full paternal aunt
13. Half paternal aunt from same mother and then from same father.

They added that relatives by fosterage will get no right in the custody of a child.

According to *Imamiyya* school of thought, the order of entitle ship for the custody of a child will be as follows (Mugniyya, 1964, p. 94):

Mother, then father, if father dies or goes out of senses, the right of custody will return back to mother if alive. Otherwise, the paternal grandfather will get the right of custody. In case where neither father nor grandfather are present, the right will shift towards legatee. If there is no legatee appointed through will, the right of custody will devolve according to the order of inheritance, where the nearer will be preferred over the less nearer. Even if similar degree of relevance is found in many relatives, the matter will be decided by the using the method of lottery.

While setting condition for the qualification of a custodian, the Jurists belonged to the all schools of thought, either in the case of male or female custodian, have agreed upon the features of sound mind, trustworthy, chastity, refraining from drinking liquor, not having sinful character and having the guts of upbringing the child in a good manner where as the condition of Islam is concerned, the *Shafīs* and Imamiyya are of the view that non- Muslim have no right of custody over a Muslim (Mugniyya, 1964, p. 95).

The *Malikīs*, *Hanbalīs* and *Hanafīs* have not put the condition of Islam for the qualification of a custodian, however, *Hanafīs* have provided detail in this regard. They are of the view in the situation where a Muslim man has married to a non-Muslim woman, the non-Muslim mother has the right of custody provided that there is no evidence of change in the belief, habits and character of the child. Otherwise, the father has the right of separating the child from her. They also view that apostasy finishes the right of custody (Al-Jaziri, 1964, p. 522).

As far as the feature of good sound health is related, the *Imamiyya* are of the view that the custodian should be free from contagious diseases. The *Hanbalīs* have added the diseases of Leucoderma and Leprosy, also. Others, except these two schools, have not considered the condition of good health (Mughniyya, 1964, p. P.95).

In the situation where a woman got divorced and married to a non-relative man, the four Sunni schools are of the opinion that the right of the custody will be withdrawn. However, they showed leniency where the non-relative husband shows sympathy towards the child, the right of custody will remain with mother (Mughniyya, 1964, p. P.95). The *Imamiyya* have showed only a single view in this regard which the cancellation of the right of custody whether the husband is sympathetic or otherwise (Mughniyya, 1964, p. P.95).

The withdrawn right of the custody for mother due to her re-marriage, returns to her after getting divorce from the new husband or not. The *Hanafīs*, *Shafīs*, *Hanbalīs* and *Imamiyya* are of the view that right of custody will be return to the mother, however, *Malikīs* have differed and viewed it vice versa (Mughniyya, 1964, p. P.95).

From the study of various Juristic schools, it is learnt that welfare and protection of child serves as main objective for the custody rights. Whatever, the situation or challenge may demand, the main objective should not be ignored. Most often, mother have a preferential right if there is no ground for her disqualification. Because mothers are extremely affectionate and kind to their children and are capable of taking care as well as protection than any other relative including father. Mothers are more sympathetic towards their children because children are part of their bodies. Sometime it may so happen that the right of selection may be given to the child himself in spite of the

fitness of both parents, thus the child will select his custodian freely. Similarly, it is also possible that right of custody may shift to other maternal relatives, even in the life of both parents, such as maternal grandmother or maternal uncle of the child.

Moreover, if the situation predicts that the custody of the mother shall be harmful to the temporal or spiritual welfare of the child, the judge has the authority to make a better choice for the child. Similarly, where no person, having a fundamental or secondary right of custody of the children, is available, then, the right shall vest in the judge himself. The judge may select one from among the relatives of the child, with a maternal link, who may preferably be within the prohibited degrees of child for contrAct of marriage. In the view of prominent *Hanafi* scholar, *Muhammad Al-Shaibani*, if there be a cousin and also a maternal uncle, in a specific situation, the maternal uncle shall get preference because the cousin is not a relative within the prohibited degree (*Non-Mahrim*) where as a maternal is a relative within the prohibited degree (*Mahrim*) and his relationship reaches to the child through his mother (Kasani, 2001, P.43, v.3).

5.2 Study of the laws regarding *Ḥaḍānah* (Guardianship)

5.2.1 Pakistan: In Pakistan, the Guardian and wards Act, 1890 consolidates the laws relating to Guardians and wards as well as custody. This Act was promulgated on 21st March 1890 and came into force on 1st July 1890. The Act extends to the whole of Pakistan.

Section 4 of the Act defines the following terms:

1. Minor: means a person who, under the provisions of the Majority Act, 1875, is to be deemed not to have attained his majority.[1]

2. Guardian: means a person having the care of the person of a minor or of his property, or of both his person and property.

In the case of *Mushtaq Ahmad* v. *Mohammad Aamir* (PLD 1962), the Karachi High Court has held a person may be a guardian of an infant either:

i. By nature in case of an heir appointment,
ii. By custom,
iii. For nurture,
iv. Naturally of by parental right
v. Parental appointment,
vi. Appointment by a court of competent jurisdiction or appointment by the infant himself.

3. Ward: means a minor for whose property or person or, both there is a guardian.

4. District Court: District court has the meaning assigned to that expression in the Code of Civil Procedure, 1908 (Act V of 1908) and

includes a High Court in the exercise of its ordinary original civil jurisdiction.

5. "The Court" means:

a. The District Court having jurisdiction to entertain an application under this Act for an order appointing or declaring a person to be a guardian or

b. where a guardian has been appointed or declared in pursuance of any such application:

i. The court which or the court of the officer who appointed or declared the guardian is under the Act deemed to have appointed or declared the guardian, or

ii. In any matter relating to the person of the ward the District Court having jurisdiction in the place where the ward for the time being ordinarily resides, or

c. In respect of any proceeding transferred under section 4 (A) of this Act, the Court or the officer to whom such proceeding has been transferred.

6. Collector: means the chief officer-in-charge of the revenue-administration of a district, and includes any officer whom the Provincial Government, by notification in the official Gazette, may, by name or in virtue of his Office, appoint to be a Collector I any local area, or, with respect to any class of persons for all or any of the purposes of this Act;

7. "Prescribed" means prescribed by rules made by the High Court under this Act.

Section 7 provides that the court has power to make orders as to guardianship if it is satisfied that it is for the welfare of a minor. Court is considered to be the guardian of minors, and so can make orders for the appointment of a guardian of his person and property or both and can declare a person to be guardian. When such order is made it implies that any other guardian who has not been appointed by will or other instrument or appointed or declared by the court, shall be removed. If a person is appointed guardian by will or other instrument or appointed or declared by the court, the order for appointment of a guardian in his place is in effective till the powers of a guardian of the person cease. (The power of a guardian of the person cease under Section 41 of the Guardian and Ward Act, 1890). [2]

Section 8 to Section 19, relate to the entitlement of person to apply for guardianship, application, from of application and the procedure for appointment of guardian.

Section 8 provides:

> **Persons entitled to apply for order.-** An order shall not be made under the last foregoing section except on the application of the person desirous of being, or claiming to be, the guardian of the minor, or any relative of friend of the minor, or the Collector of the district or other local area within which the minor ordinarily resides

or in which he has property, or the Collector having authority with respect to the class to which the minor belongs (2006, p. 52).

Section 9 adds:

Court having jurisdiction to entertain application.- (1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides. If the application is with respect of the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in the place where he has property. If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly on conveniently by any other District Court having jurisdiction (2006, pp. 53-54).

Section 10 provides:

Form of application.- (1) If the application is not made by the Collector, it shall be by petition signed and verified in manner prescribed by the Code of Civil Procedure, 1882 (14 of 1882), for the signing and verification of a plaint, and stating, so far as can be ascertained- the name, sex, religion, date of birth and ordinary

residence of the minor, where the minor is a female, whether she is married and if so, the name and age of her husband, the nature, situation and approximate value of the property, if any, of the minor, the name and residence of the person having the custody or possession of the person or property of the minor, what near relations the minor has and where they reside, whether a guardian of the person or property or both, of the minor has been appointed by any person entitled to claiming to be entitled by the law to which the minor is subject to make such an appointment whether an application has at any time been made to the Court or to any there Court with respect to the guardianship of the person or property or both, of the minor and if so, when, to what Court and with what result, whether the application is for the appointment or declaration of a guardian of the person of the minor, or of his property, or of both. Where the application is to appoint a guardian, the qualifications of the proposed guardian. Where the application is to declare a person to be a guardian, the grounds on which that person claims, The cause which have led to the making of the application, and Such other particulars, if any, as may be prescribed or as the nature of the application renders it necessary to state. If the application is made by the Collector, it shall be by letter addressed to the Court forwarded by post or in such other manners as may be found convenient, and shall state as far as possible the particulars

mentioned in sub-section (1). The application must be accompanied by a declaration of the willingness of the proposed guardian to Act, and the declaration must be signed by him and attested by at least two witnesses (2006, pp. 56-57).

Section 11 says:

Procedure on admission of application.- (1) If the court is satisfied that there is ground for proceeding on the application, it shall fix a day for the hearing thereof and cause notice of the application and of the date fixed for the hearing. To be served in the manner directed in the Code of Civil Procedure, 1882 (14 of 1882) on the parents of the minor if they are residing in (any State to which this Act extends) the person, if any, named in the petition or letter as having the custody or possession of the person or property of the minor the person proposed in the application or letter to be appointed or declared guardian, unless that person is himself the applicant, and any other person to whim, in the opinion of the Court special notice of the applicant should be given, and to be posted on some conspicuous part of the court-house and of the residence of the minor, and otherwise published in such manner as the Court, subject to any rules made by the High Court under this Act, thinks fit. The state Government may, by general or special order, require that when any part of the property described in a petition under sec. 10, sec-section (1) is land of which a Court of Wards could assume the superintendence, the Court shall also cause a notice as aforesaid

to be served on the Collector in whose district the minor ordinarily resides and on every Collector in whose district any portion of the land is situate, and the Collector may cause the notice to be published in any manner he deems fit. No charge shall be made by the Court or the Collector for the service or publication of any notice served or published under sub-section (2) (2006, pp. 58-59).

Section 12 of the Act states:

Power to make interlocutory order for production of minor and interim protection of person and property.- (1) The Court may direct that the person if any, having the custody of the minor, shall produce him or cause him to be produced at such place and time and before such person as it appoints, and may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper. If the minor is a female who ought not to be compelled to appear in public, the claiming to be her guardian on the ground of his being her husband, unless she is already in his custody with the consent of her parents, if any, or Any person to whom the temporary custody and protection of the property if a minor is entrusted to dispossess otherwise than by due course of law any person in possession of any of the property (2006, pp. 60-61).

Section 13 of Guardian and Wards Act 1890 provides:

Hearing of evidence before making of order.- On the day fixed for the hearing of the application or as soon afterwards as may be, the Court shall hear such evidence as may be adduced in support of or in opposition to the application (2006, p. 65).

Section 14 of the said Act submits:

Simultaneous proceedings in different Courts.- (1) If proceedings for the appointment or declaration of a guardian of a minor are taken in more Courts than one, each of those courts shall, on being apprised of the proceedings in the order Court or Courts, stay the proceedings before itself. In any other case in which proceedings are stayed under sub-section (1), the Courts shall report the case to and to guided by such orders as they may receive from their respective State Governments (2006, p. 67).

Section 15 of the Act narrates:

Appointment or declaration of several guardians.- (1) If the law to which the minor is subject admits of his having two or more joint guardians of his person or property or both, the Court may, if it thinks fit, appoint or declare them. Separate guardians may be appointed or declared of the person and of the property of a minor. If a minor has several properties, the Court may, if it thinks fit,

appoint or declare a separate guardian for any one or more of the properties (2006, p. 68).

Section 16 explains**:**

Appointment or declaration of guardian for property beyond jurisdiction of the Court.- If the Court appoints or declares a guardian for any property situate beyond the local limits of its jurisdiction, the court having jurisdiction in the place where the property is situate shall, on production of a certified copy of the order appointing or declaring the guardian accept him as duly appointed or declared and give effect to the order (2006, p. 69).

Section 17 of the Act gives:

Matter to be considered by the Court in appointing guardian.-

(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. In considering what will be for the welfare of the minor, the Courts shall have regard to the age, sex and religion of the minor, the charActer and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his

property. If the minor is old enough to form an intelligent preference, the Court may consider that preference. The Court shall not appoint or declare any person to be a guardian against his will (2006, p. 69).

Section 18 provides:

Appointment or declaration of Collector in virtue of office:- Where a Collector is appointed or declared by the Court in virtue of his office to be guardian of the person or property or both, of a minor, the order appointing or declaring him shall be deemed to authorize and require the person for the time being holding the office to Act as guardian of the minor with respect to his person or property or both, as the case may be (2006, p. 84).

Section19 explains that guardian will not be appointed by the Court in certain cases. It carries out an area where the court has no jurisdiction to exercise the power of declaration or appointment of guardian, as contemplated by section 7 of the Act. The court cannot exercise the power:

1- If the husband of a married female is alive or
2- If the father or husband of minor is alive and the father is not unfit.
3- When the property of the minor is under the court of wards competent to appoint a guardian of the minor.

Section 19 of the Act narrates:

> **Guardian not to be appointed by the Court in certain cases.-** Nothing in this Chapter shall authorize the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards or to appoint or declare a guardian of the person of a minor who is married female and whose husband is not, in the opinion of Court, unfit to be guardian of her person, or of a minor whose father is living and is not in the opinion of the Court, unfit to be guardian of the person of the minor, or of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor (2006, p. 84).

Under the Islamic law, a mother is entitled to the custody (*hiḍānat*) of a male child up to the end of seventh year and after that it transfers to the father and terminates with the boy's puberty. The custody of a female child belongs to her mother until she attains puberty and this right continues even though she may be divorced by her husband. The right of the mother to keep the minors in her custody does not, however, make her the natural guardian of the minors. The father alone, or if he be dead, his executor will the legal guardian. The *hiḍānat* of the mother is thus subject to the supervision of the father of the mother of the minor. The right of *hiḍānat* does not, therefore, carry with it all the powers which a guardian of the person of a minor has under this Act.

Section 20 of the Guardian and Wards Act says: that a guardian is empowered to administer the property belong to the minor and is accountable for the profit and

income he receives. He has got the right to receive and recover the benefit of the minor's property of whatever description and wherever situated which the minor is entitled to receive and recover, but he has to exercise his power as a prudent man. In certain matters he has to take prior permission of the court, and thus his position is more or less at par as a trustee i.e. trustee for the benefit of the minor ward and in a fiduciary position shall not be allowed to take advantage of his position and the court will not allow a person to be placed in a position in which his interest shall pull him one way and his duty the other.

A guardian of property stand in a fiduciary capacity toward the minor. He will be liable to render an account of his dealing with the property as such guardian. He is also liable to the court in the matter of carrying out of all the directions which the court has given to him in respect of the transaction relating to the property which the court sanctions for the benefit of the minor.

The section 20 provides:

> **Fiduciary relation of guardian to ward**.- (1) A guardian stands in a fiduciary relation to his ward, and, save as provided by the will or other instrument, if any, by which he was appointed, or by his Act, he must not make any profit out of his office. The fiduciary relation of a guardian to his ward extends to and affects purchases by the guardian of the property of the ward, and by the ward of the property of the guardian, immediately or soon after the ward has ceased to be a minor and generally all transactions between them

> while the influence of the guardian still lasts or is recent (2006, p. 90).

Section 21 explains the capacity of minor to Act as guardian. Minor is incompetent to Act as guardian of any other minor. It provides an exception to this rule. Under the English law when both the parent are dead and there is no other guardian but the child has property, the child is entitled to apply for appointment of a guardian of the property or person or both, if the applicant has attained the age of fourteen in case of male child, or twelve in case of female child. This Section further provides that minor can be appointed a guardian of his own child or wife, and, when minor is the managing member of an undivided Hindu family, he can be appointed a guardian of the wife or child of another minor member of the family.

The section 21 provides:

> **Capacity of minor to Act as guardians.-** A minor is incompetent to Act as guardian of any minor except his own wife or child or where he is the managing member of an undivided Hindu family, the wife or child of another minor member of that family (2006, p. 93).

Section 22 is regarding remuneration of guardian. When a guardian is declared or appointed by the court, he is entitled to such allowance as the court thinks for his pains, care and exercise of power. Section 22(2) says that if a collector is appointed or declared by the court, fee will be chargeable for the maintenance of his special

establishment as they are chargeable it the case estates under the superintendence of the court of wards.

The section 22 narrates:

> **Remuneration of guardian.-** (1) A guardian appointed or declared by the Court shall be entitled to such allowances, if any, as the Court thinks fit for his care and pains in the execution of his duties.
>
> (2) When an officer of the Government, as such officer, is so appointed or declared to be guardian, such fees shall be paid to the Government out of the property of the ward as the Provincial Government, by general or special order, directs (2006, p. 94).

Section 23 says that a collector appointed or declared by the court to be guardian of the person or property or both, of a minor shall in all matters connected with the guardianship of his ward, be subject to the control of the provincial government or of such authority as the government by notification in the official gazette appoints in this behalf.

The section 23 gives:

> **Control of Collector as guardian**.- A Collector appointed or declared by the Court to be guardian of the person or property or both, of a minor shall, in all matters connected with the guardianship of his ward, be subject to the control of the State Government or of such authority as that Government, by

> notification in the official Gazette, appoints in this behalf (2006, p. 94).

Section 24 narrates duties of guardian of the person. A guardian of the person of the person ward is charged with the custody of the ward and must look to his support, health and education and such other matters as the law to which the ward is subject requires. It is the duty of the guardian to see that the minor under his custody is brought up in a similar manner as its parents would have done and receives proper education suitable according to position in life and expectation. Right to custody bring in the question of obligation for maintenance, marriage, education etc, of the ward.
The section explains:

> **Duties of guardian of the person**.- A guardian of the person of a ward is charged with the custody of the ward and must look to his support, health and education, and such other matters as the law to which the ward is subject requires (2006, p. 95).

Section 25 defines title of guardianship to custody of ward. If a ward leaves or is removed from the custody of a guardian of his person the court if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order of his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered to the custody of the guardian of which the court may exercise the power of Magistrate. The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship.

The section says:

> Title and guardian to custody of ward.- (1) if a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.
>
> (2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the Code of Criminal Procedure, 1898 (Act V of 1898).
>
> (3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship (2006, p. 97).

Under the Islamic law a father as a lawful guardian of his minor children is entitled to make an application under Section 25, but the fact is that a lawful guardian does not bound the court to pass an order in his favour. The court may make an order for the return of the ward to the custody of the child if it is for the welfare of the minor which is of primary importance. The paramount consideration for the custody of a minor is his welfare. A person applying for custody must be a guardian. Claim to custody is in the nature of trust for the benefit of the child. The court cannot pass an order unless it is established that the minor was taken away from the custody of the guardian.

Section 26 explains the mode of removal of ward from jurisdiction. When a guardian of a minor if not appointed by will or is the collector, when once appointed or declared by the court shall not without the leave of the court by which he was appointed or declared remove the ward from the limits of its jurisdiction. Such guardian can remove the ward for such purpose when specified by the court. The order of the court for such purpose may be special or general. Section 26 applies to guardian appointed or declared by the court and does apply to testamentary guardians. The guardian appointed by the court derives its authority from the court, therefore, he shall apply to the court for permission to remove the wards for purpose like education, marriage, health etc. The purpose must be for the advantage and welfare of ward.

The said section provides:

> **Removal of ward from jurisdiction**.- (1) A guardian of the person appointed or declared by the Court, unless he is the Collector or is a guardian appointed by will or other instrument, shall not, without the leave of the Court by which he was appointed or declared, remove the ward from the limits of its jurisdiction except for such purposes as may be prescribed.
>
> (2) The leave granted by the Court under sub-section (1) may be special or general and may be defined by the order granting it (2006, p. 108).

The section 27 provides that a guardian of the property of a minor should deal the property as a prudent man and his transaction must be reasonable and beneficial to the minor.

The section 27 says:

> **Duties of guardian of property**.- A guardian of the property of a ward is bound to deal with as carefully as a man of ordinary prudence would deal with it, if it were his own and subject to the provisions of this Chapter, he may do all Acts which are reasonable and proper for the realization, protection or benefit of the property (2006, p. 109).

According to Islamic Law, the following persons are entitled to be guardians of the property of a minor. They have the following order of precedence:

i. The Father

ii. The Executor

iii. The Father's Father

iv. The Executor appointed by the will of the father's father

In default of these guardians, the Court may appoint a guardian for the protection and preservation of the minor's property.[3] Brother is not a legal guardian of his minor sister.[4] Similarly, father's brother is not a legal guardian under Islamic Law.[5] As far as the status of mother is concerned, she as such is not the legal guardian of her minor son. [6] She is not a de facto guardian and is therefore not competent to transfer the property of the minor. [7]

The section 29 applies to the guardians declared or appointed by the Court, and not to guardians appointed by will, or a Collector or a natural guardian. Restrictions have been placed by this section on the powers of a guardian in alienating the immovable property of his ward apply only to the case of a guardian appointed or declared by the Court, whether temporarily or permanently. Clause (b) of the section applies to contracts entered into by the Court itself for the benefit of the minor. Once a person; whether he be a natural guardian or a stranger, is appointed guardian of minor under this Act; he is clothed with all the obligations imposed by the Act in dealing with the ward's property.

The section 29 provides:

> **Limitation of powers of guardian of property appointed or declared by the Court**.- Where a person other than a Collector, or than a guardian appointed by will or other instruments, has been appointed or declared by the Court to be guardian of the property of award, he shall not, without the previous permission of the Court,-
>
> (a) Mortgage or charge or transfer by sale, gift, exchange or otherwise, any part of the immovable property of his ward, or
>
> (b) Lease any part of that property for a term exceeding five years or for any term extending more than one year beyond the date on which the ward will cease to be a minor (2006, pp. 114-115).

Section 38 states the right of survivorship among the joint guardians. The relationship of guardian and ward is that of trustee and a beneficiary. The present section recognizes this relationship by laying down that just as among trustees as among

guardians, on the death of one of the joint guardians the guardianship continues to the survivor or survivors till further appointment is made by court.

The section 38 reads:

> **Right of survivorship among joint guardians**.- On the death of one of two or more joint guardians, the guardianship continues to the survivor or survivor until a further appointment is made by the Court (2006, p. 134).

The section 39 deals with the grounds for the removal of a guardian. It applies to the case of those guardians:

a. who have been appointed or declared by the Court, or

b. who have been appointed by will or other instrument

The section 39 provides:

> Removal of guardian.- The court may, on the application of any person interested, or of its own motion, remove a guardian appointed or declared by the Court, or a guardian appointed by will or other instrument, for any of the following causes, namely :-
>
> a. For abuse of his trust:
>
> b. For continued failure to perform the duties of his trust;
>
> c. For incapacity to perform the duties of his trust;
>
> d. For ill-treatment or neglect to make proper care of his ward;
>
> e. For disobedience of the Act or order of the court;

f. For conviction of an offence implying to the opinion of the court, defect of character which unfits him to be guardian of his ward;

g.For having an interest adverse to the faithful performance of his duties;

h. For ceasing to reside within the local limit of the jurisdiction of the court;

i. The case of guardian of the property for bankruptcy and insolvency;

j. By reason of the guardianship of the guardian ceasing, or being liable to cease under the law to which the minor is subject;

Provided that a guardian appointed by will or other instrument, whether he has been declared under this Act or not, shall not be removed:

a. For having an adverse interest to the faithful performance of his duties unless the adverse interest accrued after the death of the person who appointed him or it is shown that, that person needs and of maintained the appointment in ignorance of the existence of the adverse interest, or

b. For ceasing to resides within the local limit of the jurisdiction of the court unless such guardian has taken up such a residence as, in the

> opinion of the court, renders it impracticable for him to discharge the function of guardian (2006, p. 135).

Section 40 states the discharge of guardian. If the certified guardian desires to resign his office, he may apply to the court to be discharged. If the court finds that there is sufficient reason in support of application, it shall discharge the guardian. If the guardian making an application is the collector and the Provincial Government approves of his application, the Court shall in any case discharge him.

The section 40 reads:

> Discharge of guardian.- (1) If a guardian appointed or declared by the Court desires to resign his office, he may apply to the Court to be discharged.
>
> (2) If the court finds that there is sufficient reason for the application, it shall discharge him, and if the guardian making the application is the Collector and the State Government approves of his applying to be discharged, the Court shall in any case discharge him (2006, p. 138).

Section 41 provides for the resignation of a guardian when he wishes to apply for it, and section 41 lays down the circumstances resulting in the cessation of the powers of a guardian whether he be willing to such cessation or not.

The section 41 lays down as:

Cessation of authority of guardian:- (1) The powers of a guardian of the person cease:

a. By his death, removal or discharge;

b. By the court of wards assuming superintendence of the person of the ward;

c. By the ward ceasing to be a minor;

d. In the case of a female ward, by her marriage to husband who is not unfit to be guardian of her person, or if the guardian was appointed or declared by the opinion of the court so unfit; or

e. In the case of ward whose father was unfit to be guardian of the person of the ward by the father ceasing to be so or if the father was deemed by the court to be unfit, by his ceasing to be so the opinion of the court.

(2) The powers of guardian of the property of the property cease:

a. By his death, removal or discharge,

b. By the court of wards assuring superintendence of the property of the ward, or

c. By the ward ceasing to be minor.

d. When a powers of a guardian are cased are due to any reason, the court may ask him or his representative to deliver the possession of the property of a ward along with the account.

e. When he deliver the account and possession of a property, the court may declared him to be discharge from his liabilities, if no found is formed subsequently (2006, pp. 139-140).

Section 42 provides that a fresh appointment of a guardian can be made as substitution to the discharged or died guardian during the minority of a ward.

The section 42 narrates:

> **Appointment of successor to guardian dead, discharged or removed**.- When a guardian appointed or declared by the Court is discharged, or, under the law to which the ward is subject, ceases to be entitled to Act, or when any such guardian or a guardian appointed by will or other instrument is removed or dies, the Court, of its own motion or on application under Chapter II, may, if the ward is still a minor, appoint or declare another guardian of his person or property, or both, as the case may be (2006, p. 143).

5.2.2 Malaysia:

Section 81 (1) of Islamic Family Law (Federal Territories) 1984 Act 303 explains about the Persons entitled to custody of a child. It reads as subject to section 82 , the mother shall be the best of all persons entitled to the custody of her infant children during the connubial relationship as well as after its dissolution. Section 81 (2) further adds; where the Court is of the opinion that's the mother is disqualified under Islamic Law from having the right to child custody or custody of her children, the right shall , subject to subsection section 81 (3) pass to one of the following persons in the following order of preference, that is to say:

(a) the maternal grandmother , how high so ever

(b) the father

(c) the paternal grandmother , how high so ever

(d) the full sister

(e) the uterine sister

(f) the sanguine sister

(g) the full sister 's daughter

(h) the uterine sister 's daughter

(i) the sanguine sister 's daughter

(j) the maternal Aunt

(k) the paternal Aunt

(l) the male relatives who could be heirs as their *asabah* or residuaries

Provided that the custody of such person does not affect the welfare of the child (Malaysia, 2006, p. 48).

Section 81 (3) defines that no man shall have a right to the custody of a female child unless he is a *mahrim* , that's is to say , he stands to her within the prohibited degrees of relationship. Section 81 (4) states that, subject to sections 82 and 84 , where there are several persons of the same line or degree , all equally qualified and willing to take charge of the child, the custody shall be entrusted to the most virtuous one who shows the greatest tenderness to the child, and where all are equally virtuous , then the senior among them in age shall have the priority (Malaysia, 2006, pp. 48-49).

Section 82 of Islamic Family Law states the qualifications necessary for the custody of the child. A person to whom belongs the upbringing of a child, shall be entitled to exercise the right of child custody if;

(a) she is a Muslim

(b) she is of sound mind

(c) she is of an age that's qualifies her to bestow on the child the care, love , and affection that's the child may need

(d) she is of Good Conduct from the standpoint of Islamic morality; and

(e) she lives in a place the coop the child may not undergo any risk morally or physically (Malaysia, 2006, p. 49)

Islamic Family Law (Federal Territories) 1984 Act 303 section 83 provides information about the situations where the woman loses her right of custody. They are as under:

(a). by her marriage with a person not related to the child within the Prohibited degrees if her custody in such case will affect the welfare

of the child but her right to custody will revert if the marriage is dissolved

(b). by her gross and open immorality

(c). by her changing her residence so as to prevent the father from exercising the necessary supervision over the child, except that a divorced wife may take her own child to her birth place

(d). by her abjuration of Islam

(e). by her neglect of or the cruelty to the child (Malaysia, 2006, p. 49)

Section 84 of Islamic Family Law (Federal Territories) 1984 Act 303 explains the duration of custody which is as under:

(1) The right of the *hadhinah* (حاضنة) to the custody of a child terminates upon the child attaining the age of seven years, in the case of a male, and the age of nine years, in the case of a female, but the Court may , upon application of the *hadhinah*, allow her to retain the custody of the child until is against of the age of nine years, in the case of a male, and the age of eleven years, in the case of a female.

(2) After termination of the right of the *hadhinah*, the custody devolves upon the father, and if the child has reached the age of discernment (*mumaiyiz*), he or she shall have the choice of living with either of the parents, unless the Court otherwise orders.

Custody of illegitimate children is explained by the section 85 of the said Act. It illustrates that the custody of illegitimate children exclusively appertains to the mother and her relations (Malaysia, 2006, p. 50).

Section 86 of Islamic Family Law (Federal Territories) 1984 Act 303 describes the powers of the Court to make orders of the custody.

It reads as;

(1) Notwithstanding section 81 , the Court may at any time by order to choose to a place a child in the custody of any one of the persons mentioned therein or, where there are exceptional circumstances making it undesirable that the child be entrusted to any one of those persons , the Court may by place the child in the custody of any other person or of any association the subjects of which include child welfare.

(2) In deciding in whose custody a child should be placed , the paramount consideration shall be the welfare of the child and , subject to that consideration, the Court shall have regard to:

(a) the wishes of the parent of the child , and

(b) the wishes of the child, where he or she is of an age to express an independent opinion.

(3) It shall be that it has rebuttable presumption is for the good of a child falling on his or her infancy to be with his or her mother , in order deciding whether presumption that applies to the facts of any particular case , the Court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

(4) Where there are two or more children of a marriage , the Court shall not be bound to place both or all in the custody of the same person but shall consider the welfare of each independently .

(5) The Court may, if necessary , make an interim order to place the child in the custody of any person or institution or association and the order shall forthwith be enforced and continues to be enforced until the court makes an order for the custody (Malaysia, 2006, pp. 50-51).

Section 87 of aforementioned Act defines the situations where the Court can issue orders subject to conditions. These situations are as follow:

(1) An order for custody May be made subject to terms Such as the Court thinks fit to impose and, subject to such conditions, if any, as from time to time may apply, shall entitle the person to decide all questions relating to the upbringing and education of the child .

(2) Without prejudice to the generality of subsection (1) , an order for custody may:

(a). contain the conditions as to the place where the child is to live and as to the manner of his or her education;

(b). provide for the child to be temporarily in the care and control of some person other than the person given custody ;

(c). provide for the child to visit a relative deprived of custody or any member of the family of a parent who is dead or has been deprived of

custody at such times and for such periods as the Court considers reasonable ;

(d). give a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody the right of access to the child at such times and with such frequency as the Court considers reasonable;

or

(e). prohibit the person given custody from taking the child out of Malaysia (Malaysia, 2006, p. 51).

Section 88 of Act 303 states about persons entitled for guardianship. The Act has 04 sub sections. According to sub section (1), although the right to *hadhanah* or the custody of the child may be vested in some other person, the father shall be the first and primary natural guardian of the person and property of his minor child, and where he is dead, the legal guardianship devolves upon one of the following persons in the following order of preference, that is to say:

(a) the father's father;

(b) the executor appointed by the father's will;

(c) the father's executor's executor;

(d) the father's father's (grandfather) executor;

(e) the father's father's (grandfather) executor's executor:

Provided that he is a Muslim, an adult, sane, and worthy of trust.

As per sub section (2), the father shall have, at all times, the amplest power to make by will such dispositions as he thinks best relative to the guardianship of his minor children and the protection of their interests, provided that he is in full possession of his senses.

According to sub section (3), sub section (1) shall not apply where the terms and conditions of the instrument vesting the property in the minor expressly exclude the persons mentioned therein from exercising guardianship over the property, and in that case the Court shall appoint a guardian of the property of the minor.

The sub section (4) provides; a person shall, for the purposes of guardianship of person and property, be deemed to be a minor unless he or she has completed the age of eighteen years (Malaysia, 2006, pp. 51-52).

The section 90 of Act 303 provides information about appointment of guardian by the Court in cases where legal guardians are absent. The section narrates that:

(1) In the absence of the legal guardians, the duty of appointing a guardian for the protection and preservation of the minor's property shall be upon the Court, and in making an appointment the Court shall be guided chiefly by considerations of the minor's welfare.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age and sex of the minor, the character and the capacity of the proposed guardian and his nearness of relationship to the minor, the wishes, if any, of the deceased parents, and any existing or previous relations of the proposed guardian with the minor or his

property, and where the minor is old enough to form an intelligent preference, the Court may consider that preference (Malaysia, 2006, p. 53).

Section 91 lays down procedure for appointment of mother as testamentary guardian. A mother, whether a Muslim or *Kitabiyah*, may be validly appointed executrix of the father, and in that case she may exercise her powers as a testamentary guardian or, in the absence of a legal guardian, she may be appointed legal guardian by the Court, but in the absence of such appointment she shall not deal with the minor's property.

Section 92 narrates the situation of joint guardian with mother. Where the Court appoints the mother to be guardian, the Court may also appoint some other person to be guardian of the minor's person and property, or either of them, to act jointly with the mother.

Section 93 says about variation of power of guardian of property. The Court may, in appointing any guardian of a minor's property, by order define, restrict, or extend the power and authority of the guardian in relation thereto, to such extent as is necessary for the welfare of the minor.

Section 94 informs about removal of guardian. The Court may at any time and from time to time remove any guardian, whether a parent or otherwise and whether of the person or the property of the minor and may appoint another person to be guardian in his place (Malaysia, 2006, p. 54).

The person who appointed guardian by the Court, the Court can order him for depositing the security as per section 95. According to sub section (1); where a person is appointed by the Court to be the guardian of a minor's property he shall, unless the Court

otherwise orders, give security in such sum as may be appointed for the due performance of his duties as guardian.

As per sub section(2), such security shall be given in the manner prescribed for the time being in the case of receivers appointed by the Court; and the guardian appointed shall render his accounts at such periods as may be ordered, and shall pay in any balance certified to be due from him into Court in the manner prescribed in the case of receivers (Malaysia, 2006, p. 54).

The section 96 speaks about limitation of powers of guardian appointed by Court**.** A guardian of the property of a minor appointed by the Court shall not, without the leave of the Court: *(a)* sell, charge, mortgage, exchange, or otherwise part with the possession of any movable or immovable property of the minor; or *(b)* lease any land belonging to the minor for a term exceeding one year.

(2) Any disposal of a minor’s property in contravention of this section may be declared void and on such declaration the Court may make such order as appears requisite for restoring to the minor’s estate the property disposed of.

(3) The Court shall not make any order under subsection (2) unless it is necessary or advisable in the interests of the minor (Malaysia, 2006, p. 55).

Section 97 states that guardian may not give discharge for capital property**.** A guardian of the property of a minor appointed by the Court shall not, unless in any case the Court otherwise orders, be empowered to give a good discharge for any legacy or other capital moneys payable to or receivable by the minor (Malaysia, 2006, p. 55).

The section 98 declares that guardian may support minor out of income. As per sub section (1), a guardian of the property of a minor appointed by the Court may make

reasonable provision out of the income of the property for his maintenance and education, having regard to his station in life; but no sum exceeding three hundred ringgit per month may be so applied without the leave of the Court.

According to sub section (2), where the income of the minor's property in the hands of the guardian is insufficient for such purpose, or money is required for the minor's advancement, the Court may order the provision for such purpose be made out of the capital of the minor's property, and for such purpose may authorize the sale, charge, or mortgage of any part of the minor's property and give such directions in regard thereto as may be necessary in the interests of the minor (Malaysia, 2006, p. 55).

According to section 100, the guardian may apply for opinion, advice, or discretion on any question respecting the management or administration of the minor's property of the Court (Malaysia, 2006, p. 56).

The section 101 tells about guardian of orphan child. According to this section, **w**here the father and the grandfather of a minor have died without appointing a testamentary guardian, any *penghulu*,[8] police officer not below the rank of Sergeant, any person having the custody of the minor, or any person with the powers of a Protector under the Child Act 2001 [*Act 611*], may cause the minor to be taken before the Court and the Court may appoint a guardian of the minor's person and property or either of them (Malaysia, 2006, pp. 56-57).

The section 104 provides about necessary advice to the Court regarding the custody of a child**.** When considering any question relating to the custody or maintenance of any child, the Court shall, whenever it is practicable, take the advice of some person,

whether or not a public officer, who is trained or experienced in child welfare but shall not be bound to follow the advice (Malaysia, 2006, p. 57).

As per section 105, the Court has the power to restrain taking of child out of Malaysia. Sub section (1) says: The Court may on application of the father or mother of a child:

> *(a)* where any matrimonial proceeding is pending; or
>
> *(b)* where, under any agreement or order of Court, one parent has custody of the child to the exclusion of the other, issue an injunction restraining the other parent from taking the child out of Malaysia or may give leave for the child to be taken out of Malaysia either unconditionally or subject to such conditions or such undertaking as the Court thinks fit.

(2) The Court may, on the application of any interested person, issue an injunction restraining any person, other than a person having custody of the child, from taking a child out of Malaysia.

(3) Failure to comply with an order made under this section shall be punishable as a contempt of Court (Malaysia, 2006, pp. 57-58).

5.2.3 Court decisions: In the cases of *Wan Abdul Aziz* v *Siti Aishah*,[9] the facts were that the parties, the husband an engineer and the wife, a headmistress, had married while they were studying in Australia in 1965. They had two children, *Wan Halimatual Tasma* and *Wan Anita Kartini*. After they returned to Malaysia, there were differences between them and eventually in 1973 they separated. After the separation the younger girl, *Wan Kartini*, stayed with the father in Kota Bharu where she looked after by her paternal grandmother. The elder girl *Wan Halimatul Tasma* stayed with the mother. They were divorced by mutual consent in 1974.

In the first case, the mother, *Siti Aishah,* claimed custody of the younger daughter, *Wan Anita Kartini,* who was then four years old. It appeared at that stage, that the mother was still divorced but the father had remarried again. The Kadi gave custody of the child to the mother, holding that she was entitled and fit to look after the child. On appeal to the Board of Appeal however, it was held that the order of the Kadi should be set aside and that the father should continue to have custody of the child. In its judgment the Board said: according to the evidence it is clear that *Wan Anita Kartini* began to live under the care and custody of her father Wan Abdul Aziz and her grandmother *Hajjah Wan Zabidah* from the time she was aged two years and three months and it was only after she had lived for over a year and a half that the mother took steps to claim custody and as at this date (7 June 1965) *Wan Anita Kartini* had stayed with *Hajjah Wan Zabidah* for over two and a half years, that is a period in which *Wan Anita Kartini* has got used to and to love her grandmother. Because of this, the Appeal Board feels that it would seriously affect her feelings if she was separated from her grandmother. The basis and aim of custody is the welfare of the child who is to be looked after and this is the basic right of

the child. The right must be paramount to the right of the person who claims the custody. In this case there is no evidence to show that the welfare of the child has been affected by her saying under the care of *Hajjah Wan Zabidah* and the control of her father *Wan Abdul Aziz*. The Board referred as authorities to the views of *Ibnu Al-Salah, Ali Shabramulsi, Ibn Qudamah and Syed Sabiq* in *Fiqh-us-Sunnah.*

In the second case the father *Wan Abdul Aziz* claimed of his daughter *Wan Halimatul Tasma*, then aged nine years old. By this time it appeared the mother had remarried. The Kadi in this case refused the application. He relied on the precedent and on the authorities cited in the earlier case and held that it was for the welfare of the child to remain with her mother and her maternal grandmother. A further ground relied on was that the girl herself choose to live with her mother and maternal grandmother. The father appealed to the Board of Appeal but his appeal was dismissed.

In the Kelantan case of *Wan Khadijah* v *Ismail* [10] the mother claimed custody of her five children whose ages ranged from seven to 14 years. The mother had remarried again. At the hearing, the Kadi asked the children to choose with whom they would like to live and they choose to live with the father. The Kadi gave custody of the children to the father relying on a passage in the *Mughni Muhtaj* (جحتـاملا ىغنم) to the effect that if the mother has remarried the right of custody goes to the father. The mother's appeal to the Board of Appeal was dismissed. The Board relied on the fatwa of *Shaik Ramli* to the effect that if the children are grown up and if both the father and mother have remarried again, the right of custody belongs to the father.

In the Kelantan case of *Ahmad* V *Aishah,* [11] the parties had three children aged 10 months, two years and four years at the time of the divorce. It appeared that after the

divorce in 1975 the two younger children remained with the mother while the eldest child remained with the father. The father had remarried again and the second wife had given birth to a child. The mother claimed custody of the eldest child and she succeeded in the Kadi's court. The Kadi relied on the Hadith to the effect that the mother is more loving and better able to look after the child and is entitled to the custody, so long as she has not remarried. The Kadi also referred to the *Ia'nah at-Talibin* and the *fiqh us Sunnah* and finally referred to the case where the Caliph *Abu Bakar* (RA) ordered *Umar* (RA) to give up the custody of his child to the maternal grandmother of the child. The father appealed to the Board of Appeal, which dismissed the appeal. In its judgment the Board distinguished the earlier case of *Siti Aishah* v *Wan Abdul Aziz*.[12] In that case they pointed out that girl was staying with her father and her paternal grandmother, who has under the Islamic law a right to custody of the child. In this case, however, the child was looked after by the stepmother and the Board held that it was to interest of the child and for her welfare that she should be looked after by her mother rather than by the stepmother, who has no right to custody over the child.

In another Kelantan case of *Harun* v *Che Gayah* [13] the facts were that the parties married in 1969 and had one child, *Zaiton*, born in 1971. The parties were divorced in 1972 and after the divorce the child remained with the mother and was brought up by her. The father registered his daughter as a pupil in a school in Kota Bharu and on 1st January 1978 took the daughter from the mother and sent her to the school. After a month the mother came to the school and took the child back to the kampong. It appeared that the wife had remarried. The father claimed custody of the child. After hearing the parties, the learned Kadi questioned the girl. She want to be with her mother and did not want to

go with the father. The learned Kadi (*Haji Yaacob bin Haji Taib*) dismissed the claim and in his judgment said that from the evidence it was clear the girl had been brought up by her mother since her childhood and had been with the father only for one month when her mother took her back. In the long period when she was with her mother, she had accustomed herself to be with her mother and if she were removed from her mother this would affect her feelings and be detrimental to her interests and welfare, especially in regard to her education, even though she might be sent to a better school (that is in the town). The essence and aim of the custody are the interest and the welfare of the child and these are fundamental rights of the child. This right must take precedence over the rights of those who claim custody over the child. For these reasons the learned Kadi dismissed the claim and ordered the child to remain with the mother, in accordance with ruling:

> Both the person who has custody and the person over whom the custody is exercised have their rights but the right of the person over whom custody is exercised is stronger than the right of the person who has custody.[14]

He also ordered that the father should be allowed to have access to the child in accordance with the rule:

> *The decision regarding custody is to determine the interest (hidhanah) of the child (The Qudamah*).

Although the learned Kadi did not say so, it was clear that he followed the decision of the Appeal Board in the case of *Wan Abdul Aziz bin Ahmad* v *Siti Aishah bte Abdul Rahman*.[15]

On appeal, the Appeal Board affirmed the decision of the Kadi, but amended the order so as to give custody not to the mother but to her mother, *Che Aishah*, the maternal grandmother of the child, who although aged 60 years was till physically and mentally sound. The care of the child would be under such person as *Che Aishah* may choose.

In the Kelantan case *Mohammad* V *Azizah* [16] the parties were married in 1968 and were divorced in 1972. They had one child, *Mariyati*, born in 1969. After the divorce the child remained with the mother and there was a written agreement which so provided and which contained various conditions including one that stated that the child was not to be taken out of Kelantan and that if the mother remarried, the child was to be handed over to the father. The conditions were made before and recorded by the Kadi, who stated in his oral evidence that if the wife had not agreed to the condition, the husband would not have divorced her. After the divorce the father gave maintenance for the child till 1977, when he stopped paying the maintenance. The respondent (mother) then applied for maintenance for the child. In his reply the appellant (husband) stated that he was under no obligation to maintain child as should have been returned to his custody as the respondent had remarried. The question of custody was then tried with the father as plaintiff and the mother as defendant. The appellant relied on the agreement and stated that as the respondent had married again the custody of the child should be given to him. He admitted that he too had married and had three other children. The respondent claimed that the rights of the child must be considered. The child was living happily with the mother and if she were removed from the mother's custody her welfare would be affected. The respondent called the principal of the school where the child was educated, who said that the child was making good progress and that her progress would be

affected if her home surrounding were disturbed. The learned Kadi *(Haji Yaccob bin Haji Taib*) decided that the child should remain with the respondent (mother). He stated that the evidence showed that the girl had been living with the respondent since the divorce in 1971 and that the appellant had given maintenance for her up to 1977. Thus the girls had been staying with the mother for over seven years before the appellant claimed custody. During that long period she had got used to living the respondent and she herself said (when questioned by the learned Kadi in his chambers) that she preferred to stay with the respondent and she did not want to stay with her father. Her progress in school was good and she had also learned religious knowledge. It would appear therefore her feelings and her education would be affected if she was removed from her mother, the respondent. In this judgment the learned Kadi said:

> The basis and purpose of custody (*hadanah*) is for the welfare and good of the child who is be looked after, as a fundamental right of the child, and his right must be given preference to the right of those who claim the right of custody, as is clear from what is stated in the *Tuhfah* and as stated by *Ibn-e- Salah* (d. 1245 AD) and accepted as correct by *Syed Sabiq* in his *Fiqh Al-Sunnah*, Vol 8:
>
> the person who has the right of custody and the children over whom custody is claimed both have rights but the right of the children is stronger than that of the person claiming custody.

In the Kedah case of *Rosnah* v *Mohammad Nor*, [17] it appeared that after the death of the father of the female child, his uncle came to the house to take her away, alleging

that the father had appointed him the trustee and guardian of the child. The mother claimed custody of the child and the Kadi gave the custody to her as he held the mother had a better right to the custody. The uncle's appeal to the Board of Appeal was dismissed.

In another case, in Kedah, of *Mohammad Salleh* v *Azizah*, [18] the divorced wife claimed custody of her four children aged between five years and 39 days. At the time of the divorce, it had been agreed that the child be give to the husband, but the wife pleaded that at that time she was still weak from the child birth, as it was only three days after the birth. The learned Chief Kadi held that the agreement made at the time of the divorce was contrary to the Islamic law, as he held the right of custody of the children belonged to the mother, especially as the youngest child was below two years old. He referred to the *ayat* in the Holy Quran, *Surah Al-Baqarah* (2): 232 to the effect:

> *The mothers shall give suck to their offspring for two whole years*
> *for those who desire to complete the term*.

There was no evidence in this case that the mother had done anything to lose her right. He therefore gave custody of the children to her. On appeal to the Shariah Appeal Court, it was held that the agreement made at the time of divorce was not contrary to the Islamic law, but was valid and enforceable. The court relied on the *Tuhfa* to the effect:

> If there is an agreement, then the right of the mother lapse and the right goes
> to the next person entitled.

Thus the divorced wife in this case lost her right when she made the agreement. But when subsequently she made the application to the court and withdrew the agreement, her right revived. For this the court relied on the *Tuhfah* to the effect:

> The right returns to her and this takes place even if what has taken place was because of her Action.

The Shariah Court of Appeal also held that the *ayat* in the Holy *Quran* referred to by the learned Chief Kadi was not relevant in the circumstances. The court therefore confirmed the order of the learned Chief Kadi but on different grounds.

In the Penang case of *Zawiyah* v *Ruslan,* [19] the parties who were divorced had a girl about three years old. The Chief Kadi gave custody of the child to the mother. He referred to *Kifaya al-Ikhyar* where it is stated to the effect:

> When there is a divorce between the husband and wife, and they have a child, the wife is entitled to custody, until the child is seven years old.

The conditions set out in the same authority are seven in number, that is, mentally sound, free, religious, tender and kind, trustworthy, having to husband and staying in the country. In this case there was no evidence to show that wife suffered from any defect in regard to the condition and therefore custody was given to her.

In the Perlis case of *Mansor* v *Che Pah* [20] the parties had been divorced and after the divorce the children, aged nice years, eight years and two years, lived with mother. Subsequently the father claimed custody of the children. Two of the children were of the age of the discretion (*mumaiyiz*) but the youngest was still breastfeeding. The elder children choose to live with the mother. The Kadi gave a custody of the children to the mother. He relied on the Hadith of the Prophet (peace be upon him) to the effect that if the child is of tender years then the mother has a better right to the custody of the child

and also on the Hadith that if the child is *mumaiyiz* (having the ability of discerning), he can choose either to go with the father or the mother.

In the Perak case of *Zaliha* v *Rahmat,* [21] the plaintiff had been divorced by the husband. They had two children, of who the younger boy aged two years and four months was in the custody of the plaintiff and the elder boy aged four years and nine months was in the custody of the defendant. The plaintiff claimed custody of the elder son. The learned Kadi after hearing the parties ordered the defendant to return the elder boy to the plaintiff as he was then five years old and not yet *mumaiyiz* (having the ability of discerning.

In another Perak case of *Marthiah* v *Ahmad Sulaiman,* [22] the parties had been divorced and after the divorce the three younger children aged from three to six years were left in the custody of the plaintiff. The two elder children aged nine years and 10 years were in the custody of their father, the defendant. The plaintiff claimed custody also of the elder children and alleged that they were frequently beaten by their stepmother. The defendant alleged that there had been an agreement relating to the custody between them. After hearing the parties and counsel from the Legal Aid Bureau for the plaintiff, the learned Kadi interviewed the two children. They chose to live with their father, the defendant. The learned Kadi held that as the children were above seven years they were *mumaiyiz* and they could chose whom they preferred to stay. He therefore ordered that the two children should continue to be in the custody of the defendant. He also held that the agreement between them was invalid as there were no sufficient witnesses to the agreement.

In another Perak case of *Fadzilah* V *Zamanordin,* [23] the parties had been divorced and they had two children, a daughter aged 11 months and a son ages two years. The plaintiff claimed custody of the children. The defendant in his defense stated that there had been an agreement between them stating that the children was to be in the custody of the father, the defendant. The learned Kadi stated that as there had had been an agreement between the parties, the claim for custody must be dismissed.

In the Perak case of *Mohamed Koyamo* V *Sapura*, [24] the plaintiff claimed custody of three children, a boy aged nine years, a girl aged 12 and a boy aged 13 years. The parties had been divorced and at the time of the divorce all the six children of the marriage were given to the custody of the defendant, their mother. The plaintiff claimed custody of the older children. He had remarried again. The learned Kadi questioned the children and they each replied three times that they were prepared to live with their mother, the defendant. The application of the plaintiff was therefore dismissed.

In the Johor case of *Awatif Ibrahim* V *Haji Salleh,* [25] the divorced wife claimed custody of her daughter. It appeared that she had married again and her mother lived in Egypt. The court relied on the Hadith in which the Prophet (SAW) is reported to have said that the mother has the better right to the custody, so long as she is unmarried; and also on the statement in the *I'anat at-Talibin* (اعانۃ الطالبین) to the effect;

> The person who is better qualified to look after the child is the mother who was not remarried. It is therefore clear that a mother loses her right to the custody when she remarries.

The court also held that although the maternal grandmother of the child has the right to custody, but as she was in Egypt and in order that the welfare of the child should

not be affected by being separated at such a great distance from the father and mother the custody of the child could not be given to her. For support the court referred to the *Fiqh-us-Sunnah* where it is stated to the effect:

> The person who has custody and the child over whom custody is claimed both have rights but the right of the child is stronger than the right of the person who is given custody.

The plaintiff in this case had acknowledged that when the child was staying with her father, the defendant, she received no complaint that the child had been neglected or treated with cruelty by the defendant. The defendant moreover was well able to afford to look after the child, physically, mentally and materially. The Court, therefore, decided that the custody of the child should be given to the father, the defendant.

In the Sarawak case of *Sharifah Sapoyah* V *Wan Alwi,* [26] the divorced wife claimed custody of three children of the marriage aged between 11 years and 15 years. The learned Chief Kadi referred to the Hadith relating to the custody of children and held that in this case as the children had reached the age of discretion they should be given a choice whether to live with their father or mother. As the children chose to stay with the mother the learned Chief Kadi ordered that custody of the children to be given to her.

In the Federal Territory case of *Kamaruddin* V *Rosnah,*[27] the parties were divorced and had three children whose ages ranged from five years to 10 years. After the divorce the elder girl aged 10 years chose to stay with the father. The other children were temporarily left with the father until an application was made by the mother. The mother subsequently took the two younger children from the father. Later she married a man who was not related to the children and claimed that the custody of the children be given to

her. The learned Chief Kadi held that as the mother had remarried, she had lost her right to the custody of the younger children. He also considered the welfare of the children and held that as the mother was working it was better in the circumstances that all the children should be together with the father, who had not remarried. He therefore gave custody of the children to the father.

In another Federal Territory case of *Rugayah* V *Bujang,* [28] the parties were divorced and had three children whose ages ranged from five years to 10 years. At the time of the divorce it was agreed that the eldest child, a daughter, should stay with the father while the two younger children should be with the mother. Subsequently the eldest child was also handed to the custody of the mother. However, the father did not give maintenance for them and the mother therefore applied to the court for maintenance. The learned Chief Kadi in this case ordered the three children to remain in the custody of the mother and ordered the father to pay maintenance for them.

In another Federal Territory case of K V S, [29] the Chief Kadi had made an order giving custody of a female child of the marriage to the mother, who had been divorced by the father of the child. The husband appealed. It subsequently appeared that the child had been sexuality assaulted. The father obtained an interim order giving custody to the father. At the hearing of the appeal, counsel for both parties informed the court that the parties had agreed that custody of the child be given to the father, with rights of Visitation to the mother. The Appeal Board held that because of the material change in the circumstances and having regard to the welfare of the child as the paramount consideration, the court would confirm the agreement between the parties and make a

consent order for the custody to be given to the father, subject to adequate rights of Visitation to the mother.

In the Selangor case of *Nooranita* V *Faiez Yeop Ahmad*, [30] the facts were that the parties were married in 1977 and in 1978 had a daughter. In October 1980 the wife was divorced and after the divorce the child continued to live with the mother and the wife's mother. In August 1982 the mother married a man who was not within the prohibited degree of marriage with the child. The wife's mother has also married again with a man also not *mahrim* to the child. The husband also had married again and both the father and mother had children from their new marriages. The husband applied for custody of the child and in August 1984 the learned Chief Kadi gave judgment for the husband. At that time the child was six years old. The wife appealed to the Appeal Board but unfortunately the appeal could not be heard till December 1988. Although the Appeal Board was of opinion that the paramount consideration must be given to the welfare of the child, in this case it was felt that as the child had lived for over five years and with the father and his family and as she did not express any preference to live with either her father or mother, it was undesirable to disturb the life of the child by a change of custody. The Board therefore dismissed the appeal. In the course of their judgment the Board referred to the law as laid down in the Holy Quran and the Hadith and also to some of the decisions of the courts in the States of Malaysia.

In the Kedah case of *Rusnani* V *Haji Marzuki*, [31] the parties were married in 1982 and had a daughter in 1983. They were divorced in 1983 and in 1984 the father, after he learned that the mother had remarried again, took away the child and brought her to the

house of his parents. The mother claimed the custody of the child. The learned Kadi held that as the mother had remarried again, her application must be dismissed.

In the Johor case of *Wan Juhaidah* V *Latiff*, [32] the divorced wife claimed custody of the three children of the marriage aged 12 years, 11 years and six years. It appeared that the elder children had been sent to Muar to study in a school and were living with a cousin of the husband with the consent of both parties. The learned judge decided that the elder children should remain in the custody of the father and the youngest children should remain in the custody of the mother, with appropriate rights of Visitation given to the respective parties.

In the Negeri Sembilan case of *Hayati* V *Ayab*, [33] the Kadi of the Shariah district court had given custody of the children aged three years to 14 years to the divorced mother as the father had not objected to this. There was no appeal against this order but the Board of Appeal in dealing with other aspects of the case commented that as some of the children had reached the age of the discretion their Views should have been ascertained and recorded by the Kadi.

In the Federal Territory case of *Rahanim* V *Adnan*, [34] the facts were that the parties were married in Thailand on 11 May 1987 and had a child born on 25 February 1988. The husband had divorced the wife in Thailand on 20 September 1988. The parties had come to live in Kuala Lumpur and the mother claimed custody of the child. The court held that as the child was still young, the mother was entitled to have the custody of the child.

5.2.4 Findings

Law relating to guardianship and custody of minors and those who cannot stand upon their own legs on account of tender age immaturity owes its origin to the Holy Qur'an. The original Hindu law has nothing to say on the subject and modern Hindu law is influenced by the law of Islam which held sway in Indian sub-continent during the seven centuries of Muslim rule in it. This branch of law i.e. Guardianship and Custody, had a chequered history in this region. Previous to the enactment of the Guardianship and Wards Act 1890, this branch of law was applied in fragments. A special Act for European British subjects was applied within the jurisdiction of High Courts of Calcutta, Madras, Bombay and Allahabad.

Comparative study of laws of both countries shows that Guardian and Wards Act, 1890 in Pakistan has 53 sections as compared to Malaysian Islamic Family Law Act 303, 1984 which contains 25 sections from section No. 81 to section No. 105. It is also revealed from comparative study that majority of Pakistani Muslims follow *Hanafi* school, hence, *Hanafi* influence is reflected from the Guardian and Wards Act, 1890 where as the situation of Malaysia is different in this regard and *Shafi* school is followed.

Order of the persons entitled to the custody of a child, in absence of father, is similar to one another in both countries. Another aspect of similarity of laws of the both countries is giving the preference to maternal relationships over paternal relatives. However, *Hanafi* and Shafi schools differ in case of duration of custody in terms of the age of minors. As per *Hanafi* school , a boy will remain in custody of mother till the age of seven years and a girl will remain in mother's custody till puberty (it is normally determined by the age of nine years). While, *Shafi* school is of the opinion that there is no

specific age for custody and guardianship. So, when the minor gets able to distinguish between father and mother, and, whichever the minor selects, the Court will decide in his or her favour. It is an interesting fact that scholars of *Shafi* school have determined such age as seven years which is similar to *Hanafi* doctrine.

5.2.5 Recommendations:

1. In Pakistan, the "Guardian and Wards Act, 1925" is in force. But this law does not fulfill the social needs of a Muslim society growing in various dimensions. The deficiency to a certain extent has been made up by the decisions of our courts, but it seems opportune to mention here that in the light of the courts' decisions and with the help of the law relating to *hiḍanah* current in other Muslim countries, entirely fresh legislation shall help in the removal of the most of the confusion prevailing in the present day Muslim social life caused by legislation not based on Islamic principles. The principle, "The basis of *hiḍanah* is the child's welfare" and the rule, "Woman's marriage contact with a stranger makes the right of custodianship lapse" both, in the circumstances of each case, are true by themselves, but they have obviously to be applied with reference to the special circumstances of each case.

2. Suitable amendment should be made in the Guardian and Wards Act, 1890 to provide:

a. that the court shall have power, irrespective of whether any proceedings for the custody or guardianship of a minor are pending before it or not, to direct the person having the custody of the minor to allow the father or mother or other near relative to see the minor after reasonable intervals.

b. In case of the custody of minor the father of the minor shall not be allowed custody if it is proved that he had failed to provide maintenance to the minor for a period of two years or more without a reasonable cause.

3. Section 5(1) of the Guardians and Wards Act, 1890 should be amended so that after the words "European British Subject", the words "or Pakistan Christians or Christians domiciled in Pakistan" are inserted. As a consequence of this amendment , sections 6, 15 and 19 of the Act should also be suitably amended in which the words, "European British Subjects" have been used.

4. Section 15 be amended to include that the mother of the minor should always be considered for the guardianship of the property and the person of the minor at par with any other persons.

5. Section 17 be amended so that the only consideration for the court to determine guardianship should be the welfare of the minor.

6. Section 19(a) be amended so that the husband of a minor female should not be given preference for appointment as a guardian.

7. Section 19(b) be amended to replace the words 'whose father s' with 'where either of the parents are'.

8. Section 21 be amended to allow some flexibility so that a guardian of the minor can temporarily remove the minor anywhere within the province without leave of the court but shall not remove the minor outside the jurisdiction of the province or Pakistani territory without the permission of the Guardian Court.

9. Section 26 be amended to allow some flexibility so that a guardian of the minor can temporarily remove the minor anywhere within the province without leave of the court but shall not remove the minor outside the

jurisdiction of the province or Pakistani territory without the permission of the guardian court.

10. Section 41(d) be amended so that it does not automatically make the husband guardian of a female ward.

Endnotes:

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[1] Under the Majority Act 1875 (No IX), minority ceases upon the completion of 18 years, unless a guardian of the person, or property, or both, of the minor has been, or shall be appointed before the minor has attained the age of 18 years, or the property of the minor is under the superintendence of a court of wards, in which case the age of minority is prolonged, until the minor has completed the age of 21 years. Accordingly, notwithstanding Shariah, minority of a child continues until the completion of 18 years. Until then, the court has the power to appoint a guardian for the child and her or his property or both under the provisions of the Guardian and Wards Act 1890. The relevant provision in this respect is section 3 of the Majority Act 1875, which reads as follows:

> *Subject as aforesaid, every minor, of whose person or property or both a guardian, other than for a suit within the meaning of Order XXXII of the First Schedule to the Code of Civil Procedure 1908 (No V), has been or shall be appointed or declared by any Court of Justice before the minor has attained the age of 18 years, and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards before the minor has attained that age shall, notwithstanding anything contained in the Succession Act 1925 (No XXXIX) or in any other enactment, be deemed to have attained his majority when he shall have completed his age of 21 years and not before.*
>
> *Subject as aforesaid, every other person domiciled in Pakistan shall be deemed to have attained his majority when he shall complete his age of 18 years and not before.*

Guardian and Wards Act 1890 supersedes Shariah in this matter under section 2 of the West Pakistan Muslim Personal Law (Shariat) Application Act 1962 (No V).

[2] **The powers of a guardian of the person cease.-** By his death, removal or discharge by the Court of wards assuming superintendence of the person of the ward, by the ward ceasing to be a minor in the case of a female ward, by her marriage to a husband who is not unfit to be guardian of her person or, if the guardian was appointed or declared by the Court, by her marriage to a husband who is not, in the opinion of

the Court, so unfit, or in the case of a ward whose father was unfit to be guardian of the person of the ward, by the father ceasing to be so or, if the father was deemed by the Court to be so unfit, by his ceasing to be so in the opinion of the Court.

The powers of a guardian of the property cease- by his death, removal or discharge, by the Court of Wards assuming superintendence of the property of the ward, or by the ward ceasing to be a minor. When for any cause the powers of a guardian cease, the Court may require him of, if he is dead, his representative to delivers as it directs any property in his possession or control belonging to the ward or any accounts in his possession or control relating to any past of present of the ward. When he has delivered the property or accounts as required by the Court, the Court may declare him to be discharged from his liabilities save as regards any fraud which may subsequently be discovered.

[3] PLD 1965 SC 690

[4] PLD 1937 Cal. 284

[5] PLD 1965 SC 690

[6] AIR 1937 Nag. 390

[7] AIR 1963 Pat. (DB)

[8] Headman of the village

[9] (1975) 1 JH(1) 47 and 50

[10] (1975) 1 JH (1) 53

[11] (1977) 1 JH (1) 55

[12] (1975) 1 JH(1) 47 and 50

[13] (1975) 1 JH(1) 66

[14] *Syed Sabiq, Fiqh at-Sunnah*, Vol 8

[15] (1975) 1 JH(1) 47 and 50

[16] (1979) 1 JH(1) 79

[17] (1975) 1 JH(1) 42

[18] (1984) 4 JH 212

[19] (1980) 1 JH(2) 102

[20] (1975) 2 JH 261

[21](1975) 5 JH 316

[22] (1979) 5 JH 335

[23] (1979) 5 JH 345

[24] (1974) 5 JH 352

[25] (1979) 6 JH 142

[26] (1988) 6 JH 259

[27] (1987) 6 JH 282

[28] (1987) 6 JH 332

[29] (1990) 7 JH 162

[30] (1988) 7 JH 52

[31] (1984) 7 JH 98

[32] (1989) 8 JH 122

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Chapter 6

Miscellaneous

6.1 Study of the Laws Regarding Dower in Both Countries

Mahr ranks as an important aspect of marriage contract in Islam, which the husband pays to his wife. Muslim jurists have explained the issues and situations related with the *Mahr* in detail Law of the both countries, Pakistan and Malaysia, recognizes the evidence of *Mahr* in marriage contract according to the concerned juristic school of thought followed in each of them. *Mahr* is the integral part of marriage, even if marriage have been solemnized with the condition that there would be no *Mahr* or dower, rather, the husband will have to pay a certain amount to his wife.

6.1.1 Definition (Mahr)

Muslim jurists agreed that *Mahr* is one of the conditions of validity of marriage but they slightly differed in defining the term of *Mahr*.

According to *Hanafis*, *mahr* is the amount (*Māl*) paid by the husband or his counterpart to the wife or who stands at her place (Shami, 1990). *Shafis* defined it that it is the amount obligated because of marriage, intercourse or spoiling the specific organ, intentionally, e.g. fostering and retraction of witnesses. On the other hand, *Hanbalis* introduce *Mahr* as exchange of marriage, how so ever, appointed at the time of marriage or agreed upon by the couple or authority after marriage. The *Malikis* define the term of *Mahr* as the certain thing given to wife as a replica in return to get enjoyment from her (Al-Zuhaili, 1985).

Article 285 of Principles of Muhammadan Law define *Mahr* (dower) as a sum of money or other property which the wife is entitled its receive from the husband in consideration of the marriage (Mulla, 1995).

Mr. Justice Mahmood (May 24, 1850 - May 08, 1903) provided a comprehensive definition in the famous case of *Abdul Kadir v. Salima*,[1] which is as follows,

> Dower, under Muhammadan Law, is the sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of the marriage, and even where no dower is expressly fixed or mentioned at the marriage ceremony, the law confers the right of dower upon the wife.

Mr. Neil Baillie (1799-1883) mentioned the definition of dower as;

> Under Muhammadan law dower is an obligation imposed upon the husband as a mark of respect to the wife (Baillie, 1995).

Mahr is translated as *maskahwin* in Malay language. Islamic Family Law (Federal Territories) 1984 Act 303 provides the definition of *maskahwin* as the obligatory marriage payment due under Hukum Syarak by the husband to the wife at the time marriage is solemnized, whether in the form of money actually paid or acknowledged as a debt with or without security, or in the form of something that, according to Hukum Syarak, is capable of being valued in terms of money (Malaysia, 2006).

From above mentioned definitions, some points can be inferred which denote the meaning and scope of *Mahr*.

Firstly, *Mahr* is a debt payable to wife and she in within her legal right to press for its payment. Secondly, *Mahr* is a financial gain which the wife is entitled to receive from her husband by the virtue of marriage itself whether named or not in the contract of marriage. Thirdly, anything having value equal to the *Mahr* status can be given to wife. Fourthly, the wife has full authority to spend, and waive partly or wholly as she pleases. Fifthly, the amount of *mahr* can be deferred to a specific period in addition to its immediate payment if the payment of dower is deferred then its payment will become due on either event of dissolution of marriage, or by death of husband or after divorce. Finally, *Mahr* may consist of money, property and movable objects.

It merits mentioning here that *mahr* is not the sale price of the bride, or any of her organs. The association of *mahr* with the marriage by purchase has been a serious source of confusion and inconsistency. The term "*mahr*" came to Arabic language from Hebrew, in which it was "*mahr*" originally, which stands for the amount paid by the bridegroom to the bride's father. Moreover, it is believed that the normal marriage is Hebrew society was possible only when bride's father used to arrange household items (dowry) for the newly wedded couple, and that was restored to its source in the separation of couple through elimination of the marriage's bond. It is obvious that Islam implemented the condition of *Mahr* in order to protect the economic rights of the wife after marriage and to reinforce her financial slates. She juristic schools differed in the appointment of its legal position in marriage contract. The *Shafi* School reported a couple of opinions about it. Firstly, no marriage can take place without *Mahr* and secondly, *Mahr* is compulsory to marriage contract and it is not a condition to marriage deed (Al-Shirazi, 1995, p. 55).

According to *Maliki* School, *Mahr* enjoys the position of a part in the body of marriage (Al-Dardeer, 1997, p. 428).

As per *Hanafi* School, a marriage is valid without the nomination of *Mahr*, however *Mahr mithal* (proportionate *Mahr*) will be applicable.

There are number of names which are used for the *Mahr*, interchangeably. They are; *Sadaq or Sudqa, Nihla, Ajr, Farīdha, hiba'a, uqr, tiwal, Alaiq and Nikāh* (Al-Zuhaili, 1985, p. 251).

Before the dawn of Islam, the *sadaq* was taken for the gift offered to wife in Arabia. While the *Mahr* was paid to wife's father. Therefore, it could be regarded as analogous to sale price. The Islam reformed this ritual and termed the *Mahr* as her sole right to spend, waive, reduce or donate at her own discretion.

6.1.2 Classification of Mahr: *Mahr* can be classified from two perspectives i.e. classification with regard to fixation or non-fixation and classification on the basis of immediate or delayed payment.

According to former classification, the *mahr* has been divided into specified *mahr* and proper *mahr*. The first one stands for the *Mahr* which is fixed or nominated at the time of marriage while the second one denotes such *Mahr* which is not fixed and nominated at the time of marriage. This kind of *mahr* is known as *mahr misal* also. It is the responsibility of the husband to pay *mahr* and it cannot be withdrawn in result of any contract between the wedding parties. In case where *mahr* is not specified or the marriage has held with the provision of no *mahr*, then *mahr* missal will be applicable. She formula for the determination of *mahr misal* in the social position of the wife from her father side and her own personal capabilities. In fixing the amount of *mahr* missal, attention has to

be paid to the other female members of father's family having some qualities of age, beauty, understanding and virtue. The family members from father side include sisters, paternal aunts and paternal female cousins (Fyzee, 2007, p. 138).

As per second classification, which is immediate or delayed payment, the immediate *mahr* is paid promptly at the time of marriage while it is legally allowed to defer the payment of *mahr* with mutual agreement of the wedding parties, wholly or partly, to a certain period of time. However, the period should not be as long as which imply non-payment e.g. up to 50 years.

6.1.3 Amount and limit of Mahr: All Juristic School have agreed upon that there no maximum limit for *Mahr* based on the verse [04: 20] of holy Qur'an (Al-Kasani, 1986, p. 286), the verse is as under:

If you want to take a wife in place of the one (you have), and you have given her plenty of wealth, then do not take any of it back. Would you take it through imputation and open sin?

This opinion based on the argument derived from the afore mentioned verse, that Islam has not determined any upper limit for the *Mahr*.

As far as the minimum *Mahr* is concerned, jurists have been reported with different opinions. The *Hanafis* have determined the minimum *Mahr* as ten *dirhams*,[2] which is based on the tradition of the Prophet, that *Mahr* will not be less than ten *dirhams:* (Darqatni, 2001).

اقـل َراهم يكـــون ال
دراهم ةرشع من

Another argument of *Hanafis* is the minimum criteria for applying the punishment of stealing i.e. ten *dirhams*.

The *Malikis* are of the opinion that minimum *Mahr* is three *dirhams*, purely from silver and free from any contamination (Al-Dardeer, 1997, pp. 428, v.2). While the *Hanbalis* and *Shafis* viewed that there no minimum limit for the fixation of *Mahr*. They have specified neither upper limit nor lower limit for the determination of *Mahr* (Al-Sharbeeni, 2003, pp. 220, v.3).

They based their view on the argument derived from the verse 04 : 24 of the holy Quran;

م ل ح ِ و ن ُكم لِبء را و لمكَ

ُك ل أ أ م ذ م لوا م أ

غ ت

"*You are allowed the women save the mentioned once, to marry in exchange of your wealth [Property]*".

Their another argument is tradition of prophet (SAW) reported in *Sahih Al-Bukhari* (Al-Bukhari, 1961);

دحدي نـمخامتـــالـــووظراَ

"*Look for something, even if it were an iron ring*"

It is worth mentioning here that Syrian family law article No.54 is based on this School which slates that there no minimum or maximum limit for *Mahr* (1953, p. 9).

6.1.4 Pakistan: After getting firsthand knowledge of *mahr* (dower), situation of Pakistan related to the laws and rules of *mahr* is enumerated in the following lines.

The Muslim Family Laws Ordinance 1961 has a single section No. 10 related with dower or *mahr* which deals with the issue of payment. The section reads as;

> "where no details about the mode of payment of dower are specified in the *nikahnama*, or the marriage contract, the entire amount of the dower shall be presumed to be payable on demand".

Hence, the section explains the procedure of deciding the promptness or postponement of the dower under question. For more detail we have to study the Muhammadan Law and decisions/rulings of the honourable Courts. Article 285 of Muhammadan law provides the definition of *mahr* while article 286 gives detail of specified dower. The same article also determines the minimum limit of mahr as 10 dirhams which is settled according to the *Hanafi* school of jurisprudence. It is worth mentioning here that there is no maximum limit of dower as per instructions of Shia Imamiyya school of thought (Baillie, A Digest of Muammadan Law, 1995, pp. 67-68)

The amount of dower may be fixed after marriage and the father of a minor may contract the deal of dower in marriage on his behalf as per Article 287 and 288 of Muhammadan Law, respectively. In *Basir Ali v. Hafiz*, [3] the Honourable Court held that such decision will be binding upon the son. However, the Shia Imamiyya school has added a rule when the minor son has no means of his own (Baillie, A Digest of Muammadan Law, 1995, p. 80). *Mahr Mithal*(مہر مثل) or proper dower is explained in article 289 of Muhammadan Law. This article narrates that if the amount of the dower is not fixed or marriage has been held with the provision of no mahr, then proper dower or

mahr mithal will be applicable. This article further explains that *mahr mithal* will be determined in due consideration of dowers of aunts from patrilineal side. The Shia Imamiyya school is of the opinion that the amount of mahr *mithal* should not be more than 500 dirhams (Baillie, 1995, p. 71).

The dower becomes confirmed upon husband by the occurrence of anyone of the following:

a. Consummation

b. Remaining of wedded couple in valid retirement (End Note)

c. The death of either husband or wife

The Shia Imamiyya school of thought has excluded the condition of valid retirement, hence they consider only two conditions i.e. consummation and death of either party (Baillie, 1995, pp. 73-74).

The article 290 (1) of Muhammadan Law divides the dower from aspect of immediate and delayed payment. The article explains that dower payable on demand is prompt dower while the dower payable at the time of ending the marriage contract, by death or divorce, is deferred dower. Section 290 (2) provides solution of the situation where the question of the prompt or deferred dower could not be solved. In such situation, the payment of dower will be dower decided as partly prompt and partly deferred. The ratio between prompt and deferred dower will be determined y the customary practice and, if customary practice is missing, then by the status of the parties. This procedure is according to *Sunni* school of thought while the whole dower will be considered as prompt as per *Shia* school of thought. [4]

In the case of *Nasiruddin Shah V Mt. Amatu Mughni Begum,* the learned Court held that in absence of any custom, the presumption is that it is half and half.[5]

Under the authority granted by Muhammadan Law's section 291, the wife may remit the whole or a part of dower in favour of husband or his heirs. This remission must be made with free consent without any duress or compulsion. The Lahore High Court held that wife is competent to relinquish her right to recover down.[6]

The Karachi High Court held that in situation where a woman feels that the possible way to win or retain the affection of the husband is to remit the dower amount, forgoes her claim, she is not a free agent and it would be inequitable to hold that she is bound by such remission of dower. [7]

The article 292 and onwards enumerates procedure for filing suit for the recovery of dower as well as its limitation. The wife or her heirs, can sue for the recovery of dower, it is not paid. The period of limitation for prompt dower is three years from the date when the dower is demanded and refused. In case, where during the continuance of the marriage, no such demand has been made, the date will be reckoned from the time, when the marriage is dissolved by death or divorce.

On the other hand, the period of limitation of suing the recovery of deferred dower will be three years from the date of dissolution of marriage through death or divorce. However, the said section provides more facilitation for unfixed prompt dower for which the condition of prior demand and refuse is not required, hence the wife can sue the recovery, directly.

As per section 293 of Muhammadan Law, the wife has the right to refuse living with her husband or refute the conjugal relations i.e. sexual inter course up to the

payment of prompt dower. It has been held by Lahore High Court that the right of the wife to refute performance of martial obligations on account of non-payment of prompt dower does not come to an end by her once surrendering herself. [8]

In the light of the section 296 of Muhammadan Law, a wife, after the death of her husband, has the right to retain possession of husband's property in lieu of dower provided that it has been possessed lawfully, without force or fraud until her dower is satisfied. However, the section 297 further explains that woman has the right of retention is not analogous to the mortgage because there is no real or true analogy between the two. The section 299 enumerates that woman has no right to retention during the continuance of marriage and the said right arises for the first time on husband's death, unless the marriage is dissolved by divorce, in which case it arises on proclamation of divorce. In the case of *Jamila Bibi v. Mian Khan* the wife sued her husband for recovery of her dower as specified in marriage registration form (*Nikahnama*). The husband presented a written document signed by her wife in which she has waived the dower. The wife prayed to the Court that same document has been recovered from her under pressure of police. The learned Court ordered the husband to pray the dower and withheld the order of District Court.[9]

The *Nikahnama* form which developed in the light of recommendation of Muslim Family Laws Ordinance 1961, has four sections which are concerned with dower. They are as under:

***Section 13*:**

Amount of the Dower……………………………………………………………………

Section 14:

How much of the dower is *mua'jjal* (Prompt) and how much is *mu'ajjal* (deferred)……

…………………………………………………………………………………………

Section 15:

Whether any portion of the dower was paid at the time of marriage, if so, how much ……

……………………………………………………………………………………………

Section 16:

Whether any property was given in lieu of the whole or any portion of the dower with specification of the same and in valuation agreed to between parties…………………

………………………………………………………………………………………….

6.1.5 Malaysia: The terminology of "*maskahwin*" is used to stand for the meaning of *mahr* or dower in Malay language. The article No. 21 of Islamic Family Laws (Federal Territories) 1984 Act 303 states about *maskahwin*, its payment, witnesses, payee and recording in the register.

The article 21(1) defines that *maskahwin* shall ordinarily to paid by the man or his representative to the woman or her representative in the presence of the person solemnizing the marriage and at least two other witnesses. The article 21 (2) speaks about the recording and registration of the *maskahwin* in registration document with following detail:

a. The value and other particulars of the *maskahwin*
b. The value and other particulars of *pemberian* [10] (gift)
c. The value and other particulars of any part of the *maskahwin* or *pemberian* or both that was promised but not paid at the time of the solemnization of the marriage and the promised date of payment.
d. Particulars of any security given for the payment of any *maskahwin* or *pemberian*.

maskahwin is defined in the Islamic Family Law (Federal Territories) Act 1984 as:

> "the obligatory marriage payment under Hukum Syarak [*Shariah*] by the husband to the wife at the time the marriage is solemnized, whether in the form of money actually paid or acknowledge as a debt with or without security or in the form of something that,

according to Hukum Syarak is capable of being valued in term of money. (Family law in Malaysia, p. 208).

Maskahwin is the Malay term for *mahr* or dower Islamic Family Law (Federal Territories) Act 1984 section No. 2 defines the said term in the similar manner. However, the status of Kedah uses the term of dowry for *maskahwin* and terms of gift for *pemberian.*[11] The Borneo status use the term of *berian* for *maskahwin* (Ibrahim, 1997, p. 209). Originally, the term *maskahwin* denotes the money paid by the bridegroom at the time of marriage to the parents of bride but now it is used for the Islamic term of *mahr* as substitute, which is paid to the bride herself.

Tracing the legacy of *mahr* or dower in Malay customary law, it is disclosed that presents or gifts used to serve to the bride from the betrothal ceremony to the birth of first baby or even later than it . There was not a single present or gift rather a series of conventional gifts or presents was followed. With the arrival of Islam in the region, one of these several gifts was compromised as *maskahwin* or dower.

As per *Shafi* juristic school which is followed in Malaysia, there is no minimum fixation for *maskahwin*, however, it should have some value in routine daily transactions. It is commendable that it should not be less than 10 Dirham and more than 500 dirhams (Ibrahim, 1997, p. 209).

Under the Malay customary law, the amount of *maskahwin* is determined according to status of the bride's father in society (Ibrahim, 1997, p. 209).

The Kelantan Islamic Family Law Enactment provides as follows:

I- The *maskahwin* may be paid by the husband or his representative to the wife or her representative in the presence of the person solemnizing the marriage and at least two other witnesses.

II- The Registrar shall in respect of every marriage to be registered by him, ascertain and record;

a- The amount of the *maskahwin*;

b- The amount of any *pemberian*;

c- The amount of any part of the *maskahwin* which was promised but not paid at the time of the solemnization of the marriage; and

d- Particular of any security given for the payment of any *maskahwin* (Kedah Islamic Family Law Enactment Section 12, 1984)

Section 12 of Malacca Islamic Family Law Enactment 983, also provides the same as mentioned above.

As stated earlier, the state of Kedah uses the term dowry [12] for *maskahwin*, the Islamic Family Law Enactment provides that dowry will be paid to wife or her representative by the husband or his representative at the time of solemnization of marriage in the presence of two witnesses. The Registrar shall with the respect of every marriage to be registered by him, ascertain:

I- The amount of dowry

II- The number of gifts

III- The amount or any part of the dowry or gift which was agreed upon but not settled at the time of solemnization; and

IV- The description of the security given for settling the dowry (Kedah Islamic Family Law Enactment Section 12, 1984).

V- If the *maskahwin* is not paid, the wife has the right to claim it even she can claim after separation through divorce. In this regard, section No.57 of Islamic. Family Law Enactment (Federal Territories) Act 1984 provides that nothing contained in the act shall affect any right hat a married woman may have under Hukum Syarak (Shariah) to her *maskahwin* and *pemberian* or any part thereof on the dissolution of marriage (Islamic Family Law(Federal Territonies) Act 1984 Section 57, 2006).

The honourable Courts in the states of Malaysia issued decrees for the payment of *maskahwin* after marriage.

In the state of Kedah, the *Kadi* of Court ordered for the payment of *maskahwin* in the case of *Abdul Kadir V Fatima*. [13] The judgment of Kadi Court was confirmed by the *Shariah* Court of Justice. [14]

In the state of Perlis, in the case of *Shari V Teh,* the plaintiffs prayed to the Court to issue order to his wife for the resumption of cohabitation with him. The defendant i.e. wife responded with she is willing to go back with him provided that if her *maskahwin* amounting to RM 300 is paid. The *Kadi* issued ruling and ordered the husband to pay the *maskahwin* and directed the wife to return to the husband. [15]

In another case of Kedah, the wife namely *Salma* who was divorced, claimed the payment of *maskahwin*. The husband responded that the wife has already waived this

amount and presented two witnesses. The Court after hearing the both parties decided in the favour of wife and rejected the witnesses as they had merely heard the voice of conversation and not observed who was actually speaking. [16]

In the Kelantan case of *Siti Zamrah V Majid* the divorced wife claimed the payment of *maskahwin* and *pemberian*. The husband responded to the Court that the wife has agreed to give all her property in exchange of divorce. The husband presented one witness only. The Court demanded from plaintiff to take an oath for the denial of such agreement. The Court ordered the payment of *maskahwin* in her favour. [17]

6.1.6 Findings

Comparative study of laws regarding the dower or mahr shows that it is an integral part of the marriage deed in both countries. Laws of both countries has paid considerable attention to it by recording it in marriage registration document. The situation of Pakistan shows that detailed proper legislation has not made in this regard. There is only one section in the Muslim Family Laws Ordinance 1961, which says that where no details about the mode of payment of dower are specified in the *Nikahnama*, or the marriage contract, the entire amount of the dower shall be presumed to be payable on demand.

Moreover, sections 285 to 299 of Muhammadan Law provide necessary information about the dower.

As far as the case of Malaysia in concerned, there are two sections, namely 21 and 22, in Islamic Family Law Act 303, 1984, regarding the dower or *maskahwin*. The both sections has two subsections each.

Comparison of the laws of both countries reveals that the Pakistani law is in bit detail than the law of Malaysia. The difference between both countries is in the determination of minimum dower. The majority of Pakistani Muslims follow *Hanafi* school , therefore, it is determined as 10 dirhams while Malay Muslims follow *Shafi* school, therefore, they have not determined the minimum amount of dower as per opinion of their school of thought, however, they term it commendable that dower should not be less than 10 dirhams.

6.1.7 Recommendations

1. As the majority of Pakistani Muslims follow *Hanafi* juristic school which determines the minimum limit for dower as 10 dirhams, therefore, it is suggested that Ministry of Finance and State Bank of Pakistan should announce the equal amount of 10 dirhams in each fiscal years in order to facilitate the general public and honorable Courts in determination of minimum limit of the dower in marriages. It is pertinent to mention that the ministry of finance announces the limit of minimum amount required for the deduction of *zakat* each year in addition to the amount of blood money)دیت(also.

2. It should be enacted, If no details about the mode of payment of dower are given in the nikahnama, the entire dower shall be presumed by the court to be payable on demand.

3. The Holy Qur'an is very explicit on the payment of half dower in case of the non-consummation of marriage. Various opinions of scholars and judgments, as discussed herein below, further provide for the payment of dower even in the case of valid retirement (*khilwat-e-sahiha* ولخت ہحیحص), but the law is silent on the issue.

   Therefore, either women remain silent on their rights or they spend years in litigation to get their due rights. Therefore, it is recommended that all kinds of dower should be explicitly explained in the legislation enabling easy and smooth settling of concerned disputes.

4. Though the existing law (section 10 of MFLO 1961) under which if the mode for payment of dower is not mentioned, the entire dower is presumed to be payable

on demand but it still needs more clarification to empower women to enforce their rights.

5. The present law does not specify any standard for the calculation of dower amount. *Mahr-e-Fatami* (32 Rupees), is generally considered without taking into consideration the present currency value, inflation and its objectives.

6. If no details about the mode of payment of dower or *mahr* are given in the *nikahnama*, the entire dower or *mahr* shall be presumed by the court to be payable on demand.

6.2 Study of the Laws Regarding Polygamy in Both Countries

Polygamy is defined as having more than one wife at the same time, usually more than just two [which is bigamy] (Hill, 2013). To deal with question of polygamy, a Muslim, at the first instance, has to turn to the Holy *Quran* for inspiration and guidance. The verse 04: 03 dealing with the situation of polygamy, lays down that the husbands have to option of having (up to) four wives at a time, provided the husbands possess the capacity of dealing justly amongst their wives in all respects. The second part of the verse 04: 03 however, directs a Muslim, in case of his being apprehensive of not being able to deal out justice and maintain equity among his wives, to be content with one wife only.

This impression is not factual that Islam introduced polygamy rather this was in practice in the various cultures of the world and there was no restriction on the maximum number of wives along with concubines (Dollinger, 1906, p. 430). This credit goes to Islam which reformed this practice and put restrictions over it.

6.2.1 Polygamy: an obligation or a permission: Polygamy is only a permission with limitations put on it. In the presence of the above Qur'anic provisions, one has to ponder whether polygamy, in an unrestricted form, should be allowed or not. It is argued that dealing out justice and maintaining equality of treatment among the wives, are conditions precedent to having more than one wife at a time. The conditions imposed make polygamy beyond the reach of the Muslims of Pakistan, in general. Generally, again, the character and conduct of the Muslims has so much deteriorated that the fear of the Allah and the sense of mutual obligations have almost become extinct. Such Muslims are undoubtedly expected to misuse the option of polygamy granted to them by their religion. They are expected to neglect criminally one wife in performance to the other. A

polygamy family, under the circumstances, would present an unhappy picture altogether, quite different from the one envisaged by the Holy Quran. The senior wife or wives would, invariably, be neglected and children from them would be deprived of proper love, sympathy and care of their further. Economic and other complications of domestic life would stare them in face. Consequently, the entire family would be subject to untold miseries.

As discerning people hold, equity and equality are not synonymous. The Quran by *a'dl* [دعل] (justice) refers to equitable treatment of wives more than one. Theoretical equality is impossible however pious the man and the society. So Allah has in *Surah Al-Nisa* 04: 129, laid down the standard of equity among wives.[18]

You shall never be able to maintain real equality between wives, even though you are eager to. So, do not lean totally (towards one) and leave the other as suspended. If you act righteously and fear Allah, then, Allah is Most-Forgiving, Very-Merciful.

6.2.2 Modern Legislation relating to Polygamy

Restrictions have already been placed on having more than one wife in Iraq and Morocco. Second marriage, during the life of a first wife there, depends upon obtaining previous permission of the Qazi appointed for the purpose. The granting of such permission in Syria depends on the sound financial position of the husband intending to have another wife. Iraqi law, in such cases, seeks the fulfillment of two conditions i.e. the husband's financial position must be secure and that for the second marriage there must be a pressing righteous cause based on Shariah. In Tunisia, polygamy has been completely prohibited and contravention of the law, has made punishable. This, according to the present author, is rather against the very spirit enunciated by the injunctions of Islam.

6.2.2.1 Turkey: The Turkish Code provides that no person shall marry again, unless he proves that the earlier marriage has been dissolved by the death of either party or by divorce or by a decree of nullity,(Article 93); and that a second marriage may be declared invalid by the Court on the ground that a person had a spouse living at the time of marriage, [Article 112(1)]. The same is the position under the Turkish Family Law of Cyprus. [section 8, 9 (a0]. There is, however, an exceptional rule under the Turkish Code, not found in the Cypriot law, providing that where a person marries, in god faith, another person who is already married and the former marriage is subsequently dissolved, the second marriage shall not be declared invalid, (Article 114). The permission of polygamy given by the Quran subject to certain specified conditions has, thus, been voluntarily abandoned by the Turkish Muslims. The reason for this, as stated by some Turkish scholars, was that the Qur'anic legislation on the subject was "a great improvement over

the unlimited polygamy of pre-Islamic Arabia, thus pointing out the way to monogamy," and that the changed social and economic conditions of the Turks had made the Qur'anic conditions for polygamy "unrealizable." (Article 114).

6.2.2.2 Lebanon : The Law in Lebanon does not prohibit polygamy. It only provides some safeguards in connection therewith, (Article 38, 54 (b) and 74). Thus, in accordance with the traditional Qur'anic law, it prohibits plurality of wives beyond the maximum of four and also enforces the Qur'anic injunction regarding quality of treatment between co-wives. It further recognizes the validity and judicial enforceability of a stipulation in a marriage-contract providing that in the case of husband's bigamous marriage either the first or the second wife would stand divorced.

6.2.2.3 Syria: Article 17 of the Syrian law authorizes the Court to refuse to a person who is already married permission to marry another woman, if it is established that he cannot maintain two wives. This was the first statutory provision made in the Arab world restricting a man's power to contract a bigamous marriage. According to the interpretation given by the Shafi School, the Quran subjected the permission for plurality of wives to the condition of the husband's financial capability to provide maintenance to more than one wife. The Shafi view represented in a particular form the basic and essential nature of the policy of Islamic law towards bigamy which it rather permitted as a remedial measure with a view to avoiding greater social evils.[19] Article 17 of Syrian law authorizes the *Qadi* to decide, on the basis of evidence, the question of financial capability of a person to maintain two wives., and in case he is not so capable, to refuse permission for the second marriage. This restrictive provision was based on the *Qur'anic* verse about polygamy itself.

6.2.2.4 Morocco: The treatment of polygamy in the Moroccan Code is significantly different from the Tunisian reform on the subject. Article 30(1) of the Moroccan code provides that if any injustice between the co-wives is feared, plurality of wives is not permitted. No provision is, however, made by the Code for inquiry by any authority into a husband's capacity to do justice between the co-wives in the event of his contracting a bigamous marriage. The aforementioned provision, therefore, constitutes a reiteration of the Qur'anic injunction that if one finds oneself unable to treat the co-wives equality, one must confine himself to a single wife. (According to the present writer, that is the correct approach.)

The Moroccan law, however, provides certain other rules relating to polygamy : Firstly, no second marriage with a woman shall be contracted unless the fact of the man being already married is communicated to her [Article 30(2)]. Secondly, a woman may stipulate in her marriage contract against her husband's right to contract a bigamous marriage; in such a case, if the stipulation is violated, the wife shall have a right to dissolution of her marriage. (Article 31). Thirdly, even in the absence of such a stipulation, if the second marriage causes injury to the first wife, the Court may dissolve her marriage, [Article 30(2)]. The Code once again stresses that if a man has more than one wife he must treat the co-wives equality in accordance with the Qur'anic injunction. (Article 35).

6.2.2.5 Tunisia: Article 18 of the Tunisian code says that "plurality of wives is prohibited." It also provides a penalty for persons marrying again during the subsistence of a valid marriage. Till 1964 there had been a controversy in Tunisia over the correct interpretation of the provisions of article 18. It was doubtful if a bigamous marriage

would be invalid per se or would only make the husband liable to the prescribed penalty. The Amendment Law of 1964 settled the controversy by including bigamous marriages in the list of invalid (*Fasid*) marriages. (Article 21 as amended by Law No. 1 of 1964).

6.2.2.6 Iraq: The law relating to polygamy as presently applicable in Iraq is found in Article 3 of the law of 1959 read with the provision of the Amendment Law of 1963 modifying article 13 of the main Act. According to article 3, a man who wants to contract a bigamous marriage must apply to the Court for its permission. The Court shall gave him such permission on three conditions : first, he should be financially capable of maintaining two wives simultaneously; secondly, some 'lawful benefit' should be involved in the second marriage, and lastly, there should be no fear of injustice between co-wives, the ascertainment of which fact is to be made by the Court itself. The Court shall give the permission if, in the circumstances of the case, it finds that injustice between the co-wives may take place, even if the other two conditions are fulfilled. A man who contracts a bigamous marriage without seeking the Court's permission or in disregard of its denial thereof, shall be guilty of an offence punishable by law.

Article 13 of the Law, as originally enacted in 1959, described permanent and temporary impediments to marriage. It mentioned marriage with more than one woman without the permission of the *Qadi* as a marriage barred by a temporary impediment. So, a bigamous marriage without the Court's permission was held to be irregular (*fasid*). This provision was, however, not agreed to by the *Ulema* of Iraq as, in their opinion, man-made laws could, if necessary in the interest of the society, impose restrictions on something which was permissible under the divine law but could not declare it invalid altogether. The personal Status (Amendment) Law, 1963, therefore, modified article 13 of the Law of

1959 so as to delete from it any reference to bigamous marriages. A bigamous marriages contracted in violation of the rules laid down in article in article 3 (6) of the Law, as that of Pakistan.

6.2.3 Situation of Pakistan Regarding the Polygamy

The section 6 of the Muslim Family Laws Ordinance 1961 narrates procedure for polygamy. Likewise Malaysia, polygamy is not banned in Pakistan, however, a procedure has been laid down for contracting another marriage in the existence of former marriage. The man who contravenes the procedure, will be subjected to the punishment, also.

The sections reads as follows:

(1) No man, during the subsistence of an existing marriage, shall except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall any such marriage contracted without permission be registered under this ordinance .

(2) An application for permission under sub section (1) shall be submitted to the Chairman in the prescribed manner together with the prescribed fee, and state shall reasons for the proposed marriage, and whether the consent of the existing wife or wives has been obtained thereto.

(3) On receipt of the application under sub-section (3), the Chairman shall ask the applicant and his existing wife or wives each to nominate a representative, and the Arbitration Council so constituted may, if satisfied that's the proposed marriage is necessary and just, grant, subject to such condition if any, as may be deemed fit, the permission applied for .

(4) In deciding the application the Arbitration Council shall record its reasons for the decision and any party may , in the prescribed manner , within the prescribed period, and on payment of the prescribed fee, prefer an application for revision, to the collector

concerned and his decision shall be final and shall not be called all in question in any Court.

(5) Any man who contracts another marriage without the permission of the Arbitration Council shall,

(a) pay immediately the entire amount of the dower whether prompt or deferred , due to the existing wife or wives , which amount , if not so paid , shall be recoverable as arrears of land revenue ; and

(b) on conviction upon complaint be punishable with simple imprisonment which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

6.2.4 Situation of Malaysia Regarding the Polygamy

Polygamy is not banned in Malaysia, however some restriction have been put on it. Section 23 of Act 303 Islamic Family Law (Federal Territories) Act 1984 describes the issue of polygamy. The Act reads as:

(1) No man, during your the subsistence of a marriage, shall, except with the prior permission in writing of the Court, contract another marriage with another woman nor shall standard and poor standard and poor marriage contracted without permission be registered under this Act: Provided that the Court may if it is shown that's standard and poor marriage is valid according to Islamic law orders it to be registered subject to section 123.[20]

(2) Subsection (1) applies to the marriage in the Federal Territory of a man who is resident within or outside the Federal Territory and to the marriage outside the Federal Territory of a man resident in the Federal Territory.

(3) An application for permission shall be submitted to the Court in the prescribed manner and shall be accompanied by a declaration stating the grounds on which the proposed marriage is alleged to be just and everyone is against it , the present income of the applicant , particulars of his commitments and his ascertainable financial obligations and liabilities, the number of his dependants, including persons who would be his dependants as a result of the proposed marriage, and whether the consent or views of the existing wife or wives on the proposed marriage have been obtained .

(4) On receipt of the application, the Court shall summon the applicant and his existing wife or wives to be present at the hearing of the application, which shall be in camera, and the Court may grant the permission applied for if satisfied :

(a) that the proposed marriage is just and necessary, having regard to standard and poor circumstances as, among others, the following , that's is to say, sterility, physical infirmity, physical unfitness for conjugal relations, willful avoidance of an order for restitution of conjugal rights , or insanity on the part of the existing wife or wives ;

(b) that the applicant has standard and poor means as to enable him to support as required by Islamic law all his wives and dependants, including persons who would be his dependants as a result of the proposed marriage ;

(c) that the applicant would be able to accord equal treatment to all his wives as required by Islamic Law; and

(d) that the proposed marriage would not cause *darar syariah* to the existing wife or wives.

(5) A copy of the application under subsection (3) and of the statutory declaration required by subsection that shall be served together with the summons on each existing wife.

(6) Any party aggrieved by or dissatisfied with any decision of the Court appeal against the may decision in the manner provided in the administration enactment for appeals in civil matters.

(7) Any person contracts a marriage have you in contravention of subsection (1) shall pay the time immediately entire amount of the *maskahwin* (dower) and the existing *pemberian* (gifts) due to the wife or wives amount all which, if not so paid, shall be recoverable as a debt.

(8) The procedure for registration and solemnization of a marriage under this section shall be similar in all respects to that applies to marriages solemnized and registered other in the Federal Territory under this Act.

It is provided in the section 123 of Act 303 Islamic Family Law (Federal Territories) Act 1984 that any man who during the subsistence of a marriage, contracts another marriage in any place without the prior permission in writing of the Court commits an offence and shall be punished with a fine not exceeding RM 1,000 or with imprisonment no exceeding six months or with both such fine and imprisonment.

It is provided in Kedah that the Court may in addition to the fine order the offender to pay compensation or other payments due by the offender to the wife or wives.

6.2.5 Findings:

In both countries, Pakistan and Malaysia, polygamy is not banned, however, it has been restricted with adopting a procedure. The procedure of each country differs from the other. In Pakistan, the matter of polygamy will be decided by the Arbitration Council whose decision will not be questioned in by any Court while, in Malaysia, the Court will decide the fate of such marriage, keeping in view the whole situation. The punishment suggested by Muslim Family Laws Ordinance 1961 is imprisonment to one year or fine not exceeding Rs. 5000 or with the both. In Malaysia, the limit of imprisonment for the person who contravenes the section 23 of the Act 303 of the Islamic Family Law (Federal Territories) 1984, is decided as 6 months or fine which is fixed as RM 1000 or with the both. The law of both countries does not nullify the polygamous marriage contracted without opting the prescribed procedure and accept it as a legal union after the punishment.

Modern legislation has sought to set strict limits to the practice of polygamy, if not eliminate it altogether. At the one extreme of the process of reform is the Tunisian Law of 1956, which prohibits polygamy outright. At the other is the Moroccan Law of 1958, which enacts : "If any injustice is to be feared between co-wives, polygamy is not permitted", but only allows the Court to intervene by granting judicial divorce to a wife who complains of injury suffered as a result of her husband contracting another marriage. Syria, Iraq and Pakistan have adopted a middle course by requiring official permission for a polygamy marriage. In Syria, the Court may refuse such permission where it is established that the husband is not in a position to maintain and support more than one wife. To this criterion the Iraqi Law adds the proviso that there must be "some lawful

benefit involved" in the proposed union, and gives the Court a discretion to refuse permission "if any failure of equal treatment between co-wives is feared". In Pakistan the necessary permission is to be given by an Arbitration Council, consisting of the Chairman of the local union council, a representative of the husband and a representative of the existing wife, on being "satisfied that the proposed marriage is necessary and just" and imposing "such conditions, if any may be deemed fit."

In Tunisia, after a great deal of reluctance, the view became acceptable to the Courts that a polygamous marriage was invalid; and this was expressly stated to be so by subsequent legislation of 1964. Elsewhere, however, a polygamous marriage contracted in defiance of the various provisions is not invalid per se. This reflects the strength of traditionalist opposition to the reforms, particularly in Iraq where the code of 1959 dealt with polygamous union improperly contracted in the context of impediments to a valid marriage. But an amendment of 1963 to the Iraqi code deliberately removed "marriage with more than one wife without the permission of the Court" from the list of impediments to a valid marriage. In all cases, however infringement of the provisions entails statutory penalties. In Pakistan a second marriage without the permission of the Arbitration Council entails a threefold sanction. The husband becomes liable to imprisonment for a period not exceeding one year, or a fine of up to 5,000 rupees, or both: he is obliged to pay forthwith the entire dower of his existing wife, even though it had been agreed that payment of the whole or a portion thereof was to be deferred : and finally the existing wife becomes entitled to sue for judicial dissolution of her marriage in the Court of law.

In Tunisia, complete ban on polygamy and, further, declaring a polygamous marriage to be invalid is against the spirit and dictates of *Shariah*.

6.2.7 Recommendations

1. In Pakistan, the rules framed and the provisions made do not cover the entire ground. The righteous cause based on *Shariah* ought to have been made the sole basis for granting permission to contract another marriage during the existence of one or more wives. In the view of Justice (Retired) *Tanzil ur Rehman* (1978), a righteous claim to remarriage based on Shariah has a range that covers all the circumstances arising in such cases. Obtaining permission from the existing wife per force, and constituting an Arbitration Council for the purpose wherein the existing wife is also represented, are provisions that stretch the matter too far, and have no sanction is *Shariah*. Empowering a Family Court to grant permission for contacting a second marriage after a summary enquiry conducted in the light of the provisions laid down by *Shariah* would have been more appropriate in the present circumstances. Therefore, it is suggested that power of granting permission should be transferred to the Family Courts, which should enquire the matter and should grant permission after recording the sureties from the man who is re-marrying.
2. The jurisdiction to entertain and hear Revision applications against any order or decision of a Family Court should exclusively be conferred on the District Courts, instead of the Collector or Deputy Commissioner or any other administrative tribunal.

6.3 Study of the laws regarding dowry in both countries

The Encyclopedia Britannica defines dowry as the money, goods, or estate that brings a woman to her husband in marriage or his family. Most common in cultures that are strongly that patrilineal and expect women to reside with or near their husband's family (patrilocality), dowries have long history in Europe, South Asia, Africa, and other parts of the world (Dowry, 2013).

The Black Law Dictionary defines the term dowry as the property which brings a woman to her husband in marriage; now more commonly called All a "portion." By Dowry is meant the effects which brings the wife to the husband to support the expenses of marriage (What is Dowry, 2013).

The Dowry and Bridal Gifts (Restriction) Act, 1976 is the relevant legislation about dowry (*jahez جہیز)* in Pakistan. The said act provides definition of Bridal Gifts and Dowry which distinguishes between both of them. According to section 2(a) Bridal Gift means any property given as a gift before, at or after the marriage either directly, by the bride groom or his parents to the bride in connection with marriage but does not include *Mahr*. While the section 2 (b) defines that dowry is any property given before at or after the marriage either directly or indirectly, to the bride by her parents in connection with the marriage but it does not include property which the bride may inherit under the laws of inheritance and succession applicable to her (Farani, 2011, p. 281).

Section 3 of the above mentioned act reads as neither the aggregate value of the dowry and presents given to the bride by her parents nor the aggregate value of bridal gifts or of the presents given to the bridegroom shall exceed five thousand rupees. Section 5 of the act suggests that all the property given as dowry or bridal gifts and all

property given to the bride as present shall vest absolutely in the bride and her interest in property however derived shall hereafter not be restrictive, conditional or limited. Section 9 of the act provides penalty for those who contravenes or fails to comply with any provision of the act or the rules shall be punishable with imprisonment of the either description for a term which may extend to six months or with fine which shall not be less than the amount proved to have been spent in excess of the maximum limits laid down in this act or with both and dowry, bridal gifts or presents given or accepted in contravention of the provisions of this act shall be forfeited to the Federal Government (Farani, 2011, pp. 282-284).

The concept of dowry in Malaysia is different from that of Pakistan. The dowry is something that a groom is obliged to give to his wife on their wedding day, usually ,but not always, in monetary form. Based on this technical definition , this would mean the obligatory *maskahwin* in Malaysia , which is an amount that must give every groom to his bride ,without which the wedding would not be valid . The amount varies from state to state.

In addition to this obligatory *maskahwin*, in Malaysia, there is the cultural practice of giving *wang hantaran*. This is a certain amount of money or a gift from the groom to the bride, all which is fixed usually by the bride 's family. The amount would depend on many factors the bride's educational background or occupation, social the standing of both, some sentimental reasons between the bride and groom , just to name a few.

Sometimes the bride 's family does not set the amount and just they just leave it to the groom's family . In some cases , the bride 's family might even specify the addition of gold bracelet or gold necklace (Malay Wedding Part 2: Hantaran).

Customary practice of dowry in Malaysia is variant from the custom of Pakistan. In Malaysian custom, the bride or her parents do not provide any kind of material goods or things except gifts and husband has to pay the dower amount and dowry. This culture is totally different from Pakistan where in some cases bridegroom's family provides a list of articles for provision as dowry. In such circumstances, the Pakistani government introduced the Dowry and Bridal Gifts (Restriction) Act 1976 which restricted this practice and fixed a specific limit for dowry, bridal gifts and presents which is five thousand rupees and one hundred rupees, respectively.

6.3.1 Recommendations

1. Keeping in view the customary practice of dowry in Pakistan, it is recommended that fixed limit for the dowry, bridal gifts and presents should be reviewed as it was determined almost 38 years before. The limitation of rupees five thousand on the aggregate amount of dowry is unrealistic for people belonging to multiple strata of the society. Therefore, Dowry and Bridal Gifts (Restriction) Act, 1976 should be revised on realistic lines keeping in view the rising inflation.
2. It is further recommended that the limit of the dowry and bridal gifts should be reviewed after suitable intervals by the finance ministry to ensure maximum relief to the effected families.
3. Though under the law dowry exceeding rupees five thousand is illegal even the customarily expensive dowries are given (without any documentation), mostly on demand of the bridegroom and his family. Thus upon dissolution of marriage, it is practically difficult to have her dowry back from the husband and his family members. Even otherwise in the absence of any documentary evidence recovery of the dowry articles is quite difficult.
4. the Dowry Prohibition Act 1961 made an outright declaration that 'demanding, giving and taking' of dowry would all be punishable offences but the social evil of dowry is rampant throughout the country. Therefore, it is recommended that the concerned law should be implemented in letter and spirits.

6.4 Temporary and Permanent prohibited women to marrying

It is stated in Holy Quran to the effect:

Prohibited to you for marriage are – Your mothers, daughters, sisters;

father's sisters, mother's sisters; brother's daughters, sister's daughters; foster-mothers who give you suck, foster sisters; your wives' mothers; your step daughter under your guardianship, born of your wives to whom you gone in. No probation if you have not gone in – those who have been wives of your sons proceeding form your lines; and two sisters in wedlock at one and the same time, except for what is past. For God is Oft-Forgiving, Most Merciful. Also prohibited are women already married except those whom your right hands posses. Thus has God ordained against you. Except for those all others are lawful, provided you seek them in marriage with gifts from your property, desiring chastity not lust. Seeing that you derive benefit from them give them their dowers as prescribed; but if after a dower is prescribed, you agree mutually to vary

it these is no blames on you. And God is All-Knowing, All-Wise (*Surah an-Nisa* 4 : 23-24).

(2).

Do not marry unbelieving women until they believe; a slave woman who believe is better than an unbelieving women even though she allures you. Nor marry your girls to unbelievers until they believe; a man slave who believes is better than an unbeliever even though he allures you. Unbelievers do but beckon you to the fire. But God makes His Signs grace clear to mankind. Celebrate His praise (*Surah al-Baqarah* 2 : 221).

(3).

مَ يَ لوَ مْ مْ كمُ مَي م

أفقلمَ إولسلْ

'O you who believe! When there come to you believing women refugees examine and test them. God knows best as to their faith. If you ascertain that they are believers then send them no back to the unbelievers. They are not lawful wives for the unbelievers nor are the unbelievers lawful husbands for them. But pay the unbelievers what they have spent on their dower and there will be no blame on you if you marry them on payment of their dower to them. But hold not to the tie of marriage with unbelieving

women: ask for what you have spent on their dowers and let the unbelievers ask for what they have spent on the dowers of women who have come over to you. Such is the Command of God. He judges who have come between you. And God is full of Knowledge and Wisdom (*Surah al-Mumtahinah* 60 : 10).

(4).

This day are all good things and pure made lawful to you. The food of the people of Book is lawful to you and yours is lawful to them. Lawful to you in marriage are not only chaste women who are believers but chaste women among the people of the Book revealed before your time – when you give them their dowers and desire chastity not lewdness nor secret intrigues. If anyone rejects faith fruitless is his worth and in the hereafter he will be in the ranks of those who have lost (*Surah al-Maida* 5 : 5).

(5).

Let no man guilty of adultery or fornication marry any but a woman

similarly guilty or an unbeliever. Nor let any but such a man or an unbeliever marry such a woman. To the believers such a thing is forbidden (*Surah an-Nur* 24 : 3).

In the tradition of Prophet (SAW) it is stated to the effect:

عـن أبـي هريرة رضي الله عنه أن النبي صلى الله عليه وسلم قال لا يجمع بين المرأة وعمتها ولا بين المرأة وخالتها أ

Abu Huraira (RA) reported that the Prophet (peace be upon him) said:

One should not combine a woman and her father's sister nor a woman and her mother's sister.[21]

(b) عـن عائشة أن النبي صلى الله عليه وسلم قال يحرم من الرضاعة ما يحرم من الوَلادة ا

Aisha (RA) reported that the Prophet (SAW) said:

Fosterage makes unlawful what birth makes unlawful. [22]

6.4.1 Pakistan It is evident from the above mentioned verses and traditions of Prophet (SAW) that there are some kinds of relations with whom contracting of marriage is not allowed either permanently or temporarily. According to the section 260 of principles of Muhammadan law some relations are banned to marry on the basis consanguinity. According to this section, a man cannot marry:

i. his mother or his grandmother how high so ever

ii. his daughter or his granddaughter how low so ever

iii. his sister whether full, consanguine or uterine

iv. his niece or great niece how low so ever

v. his aunt or great aunt how high so ever whether paternal or maternal (Mulla, 1995).

Section 261 of Principles of Muhammadan Law provides prohibition on the ground of affinity. The section provides as a man is prohibited from marrying:

i. his wife's mother or grandmother how high so ever

ii. his wife's daughter or granddaughter how low so ever [marriage with the wife's daughter or granddaughter is prohibited only if the marriage with the wife was consummated (Neil Baillie, pp 24-29)].

iii. the wife of his father or paternal grandfather how high so ever

iv. the wife of his son or his son's son or daughter's son how low so ever (Mulla, 1995).

section 262 of the Muhammadan Law narrates prohibition on the ground of fosterage. The section reads as whoever is prohibited by consanguinity or affinity is prohibited by reason of fosterage except certain foster relations, such as sister's foster-mother or foster-sister's mother or foster-son's sister or foster brother's sister (Mulla, 1995).

Section 263 of the Muhammadan Law describes unlawful conjunction (union) of wives. The section says that a man may not have at the same time two wives who are so related to each other by consanguinity, affinity or fosterage, that if either of them had been a male, they could not have lawfully intermarried, as for instance two sisters or aunt and niece (Mulla, 1995).

6.4.2 Malaysia

Section No.9 of the Islamic Family Law (Federal Territories) Act 1984 provides:

(1) No man or woman, as the case may be, shall on the ground of consanguinity, marry:

(a). His mother or father,

(b). His grandmother or grandfather or upwards, whether on the side of his father or his mother, and his or her ascendants, how-high-so ever,

(c). His daughter or her son and his granddaughter or her grandson and his or her descendants, how-low-so ever;

(d). His sister or her brother of the same parents, his sister or her brother of the same father, and his sister or her brother of the same mother

(e). The daughter of his brother or sister, or the son of her brother or sister and the descendants, how-low-so ever, of the brother or sister,

(f). His aunt or her uncle on his father's side and her or his ascendants;

(g). His aunt or her uncle on his mother's side and her or his ascendants;

(2) No man or woman, as the case may be, shall, on the ground of affinity, marry-

(a) His mother-in-law or father-in-law and the ascendants of his wife, how-high-so ever;

(b) His stepmother or her stepfather, being his father's wife or her mother's husband;

(c) His step grandmother, being the wife of his grandfather or the husband of her grandmother, whether on the side of the father or the mother,

(d) His daughter-in-law or her son-in-law;

(e) His stepdaughter or her stepson and her or his descendants, how-low-so ever from a wife or a husband with whom the marriage has been consummated.

(3) No man or woman, as the case may be, shall, on the ground of fosterage, marry any woman or any man connected with him or her through some act of suckling where, if it has been instead an act of procreation, the women or man would have been within the prohibited degrees of consanguinity or affinity.

(4) No man shall have two wives at any one time who are so related to each other by consanguinity, affinity, or fosterage that if either of them has been a male a marriage between them would have been illegal in Hukum Syarak.

The Kelantan Islamic Family law Enactment provides as follows:

(a) No male person may because of *nasab*)نسب(marry the following persons:

(i) Mother.

(ii) Grandmother and above whether on the father's side or on the mother's side.

(iii) Daughter and granddaughter and below.

(iv) Sister of the same father and mother, sister of the same father and sister of the same mother.

(v) Daughters of brother or sister and below.

(vi) Paternal aunty (*Ammah* عمة) and above.

(vii) Maternal aunty(*khalah* خالة) and above.

(b) No male may because of affinity marry the following persons:

(i) Mother-in-law and above

(ii) Step mother that is father's wife.

(iii) Step grandmother that is grandfather's wife, whether paternal or maternal.

(iv) Daughter-in-law and son-in-law.

(v) Step child and below.

(vi) Wife's sister.

(vii) Wife's niece and below.

(viii) Wife's aunty and above.

(c) No male person may because of relationship by *sesusuon* (fosterage) marry the following persons:

(i) All woman prohibited to be married to because of *nasab* or affinity.

It is provided in the Islamic family Law (Federal Territories) Act 1984 that no man shall marry a non-Muslim except a *kitabiyyah*, no woman shall marry a non-Muslim. *Kitabiyyah* is defined to mean:

(a) A woman whose ancestors were from ; or

(b) A Christian woman whose ancestors were Christians before the prophet hood of the Prophet Muhammad (SAW) ; or

(c) A Jewess whose ancestors were Jews before the prophet hood of the Prophet Isa (Jesus).

In Kelantan it is provided by the Islamic Family Law Enactment 1983 that no male person can marry a person who is not a Muslim; and no female person can marry a person who is not a Muslim.

In Perak it is provided by the Islamic Family Law Enactment 1984 that no man or woman shall marry a non-Muslim.

In Sarawak it is provided by the Ordinan Undang-Undang Keluagra Islam 1991 that no person can marry with a person who in not a Muslim.

6.4.3 Findings:

Majority of the people of Pakistan follow *Hanafi* school of thought while *Shafi* school of thought is followed in Malaysia. Both schools of thought are in agreement over the women prohibited to marry because all such prohibitions are derived from the holy Quran. However, they differed on the issue of woman born in the result of adultery which is one of the reason which causes prohibition for marrying a certain woman. *Hanafi*s are of the opinion that a girl born in the result of adultery will be considered prohibited for the adulterer same like his own legitimate daughter. They argued that such girl is born from his semen like the original daughter. However, impacts of real and legal marriage will not appear in such case which are inheritance and maintenance.

Shafis argue contrary to the opinion mentioned above as they view the girl born from adultery has no prohibition as she has born of an illegitimate action and *Shariah* has not paid any regard to it in the terms of inheritance and maintenance. Therefore, she is totally stranger and unfamiliar to him (Mughniyya, 1964, pp. 26-27).

6.4.4 Recommendation

It is clear from the study of laws regarding the prohibited women to marry that *Hanafis* and *Shafis* have almost the same viewpoint on the matter. However, it is recommended that list of all prohibited relations should be published after necessary legislation in order to provide easy access for all concerned ones same like the Malaysia's Act 303 provides the list of prohibited women for marrying.

Endnotes:

[1] (1886) 8 All 149

[2] *Dirham* was a silver coin used in past for trading, it weighed to 3.12 grams, hence weight of ten *dirhams* is equal to 31.20 grams of silver nowadays

[3] (1909) 13 Cal. W.N. 153

[4] *Masthan Sahib V Assan Bibi* (1899) 23 Mad. 371 (F.B)

[5] 1948 Lahore 135 F.B

[6] Muhammad *Ihsan V. Muhammad Imran* PLD 1993 Lahore 358

[7] PLD 1956 Karachi 363

[8] Rahim Jan v. Muhammad (1955) Lahore 294; PLD 1955 Lahore 122

[9] PLD 1999 Lahore 417

[10] Ahmad Ibrahim (1997) Islamic Family Law, Malayan Law Journal, Kualalumpur, p. 208

[11] Pemberian is defined to mean a gift whether in the form of money or thing given by a husband to wife at the time of marriage (Ahmad Ibrahim (1997) Islamic Family Law, Malayan Law Journal, Kualalumpur, p. 208)

[12] The translation of maskahwin as dowry is not accurate (Ahmad Ibrahim (1997) Islamic Family Law, Malayan Law Journal, Kualalumpur, p. 211)

[13] (1970) 2 JH 99

[14] *Abdul Kadir V Fatima* , (1970) 2 JH 99

[15] *Shaari V Teh* (1083 3JH 108

[16] *Salma V Mat Akhir* (1983) 5 JH 161

[17] *Siti Zamrah V Majid* (1986) 6 JH 130

[18] For further discussion see Maududi's "Tafhim al Quran," and Mufti Muhammad Shafi's "Maraif Al Quran, commentary of the verse relating to '*adl* and other relevant verses

[19] For a discussion of the nature relating to the Islamic law of bigamy and the opinions of various jurists of Islam on it, See Tahir Mahmood; "Dissuasive precepts in Muslim Family Law' 2 alig. L.J (1965) 122126;

also by the same author Control of Polygamy : Islamic Doctrines' Radiance Views Weekly, Dehli 125 Aug 1971, 33

[20] It is provided in the section 123 of Act 303 Islamic Family Law (Federal Territories) Act 1984 that any man who during the subsistence of a marriage, contracts another marriage in any place without the prior permission in writing of the court commits an offence and shall be punished with a fine not exceeding RM1,000 or with imprisonment no exceeding six months or with both (Act 303 Islamic Family Law (Federal Territories) Act 1984, p. 63).

[21] *Sahih Muslim, Kitab al-Niakh*, vol 2, at pp. 709-710

[22] *Sahih Muslim, Kitab al-Nikah*, vol 2, at p. 737

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Recommendations of the Study

The Study of Muslim Family Laws of both countries reveals that Malaysian Muslim Family Laws are in better position than Pakistan, and, therefore, stern efforts are needed to bring reforms in Muslim Family Laws of Pakistan. In this regard, three important recommendations are presented. Firstly, Muslim Family Laws of Pakistan are scattered in Acts, Ordinances and legal decisions of honourable Courts, hence a man cannot easily find concerned law easily, therefore, they should be compiled through codifying in one book after necessary legislation. The Act 303 of Malaysia can serve as a model in this regard. Secondly, the language of the laws should be easy for the comprehension and understanding of the general public. Thirdly, Marriage and Divorce registration system should be extended to Tribal Areas of the country which are currently excluded from registration mechanism.

After that, the summary of chapter wise recommendations is presented in the following:

1. It is recommended that proper chain of officials for registration of marriages and divorce should be introduced in Pakistan to keep check on the subordinate officials and ensuring smooth running of affairs as well as protection of documents. In this connection, it is suggested on the basis of the current comparative study that Senior Registrar and Chief Registrar of *Nikāh* and Divorce should be introduced. The Senior Registrar will supervise a district and Chief Registrar will oversee the Division. The *Nikāh* Registrar will report to Senior Registrar and Senior Registrar will report to Chief Registrar. At the level of province, there should be a Provincial Chief Registrar, who will supervise and guide the

whole province in order to ensure correct and in time entries in marriage documents.

2. It is also recommended that *Nikāh* Registrar himself should be authorized for the solemnization of marriages in concerned locality rather than inviting another person for the solemnization e.g. *Imām* or *Khateeb* of the locality.
3. The registration of post solemnized marriages should be discouraged and a fine should be imposed on such cases. Every marriage should be registered at the time of its solemnization.
4. The standard *Nikāhnama* requires furnishing correct information at one side and its recording on the other one. Properly maintained and utilized *Nikāhnama* can be extremely valuable in establishing the fact of marriage and defining its terms and conditions. Therefore, it is recommended that *Nikāh* registrars should be adequately educated and properly trained to perform their responsibilities more effectively.
5. It is recommended that there should be a specific limit of religious and secular education to qualify for the licence of *Nikāh* Registrar. It would be more better if a special diploma course be developed for the qualification of a *Nikāh* registrar providing them detailed information about their specific job.
6. The *Nikāh* Registrar should be aware of the fact that his major responsibility is the protect the rights of both wedding parties especially

of oppressed women, therefore, he should verify all information before recording in the document of registration.

7. Keeping in view the current technological development, it is suggested that record of marriage and divorce should be computerized and biometric technology should be used for recording the statements of the wedding of couple. This process will help in ending the problem of forced marriages.
8. At the time of promulgation of Muslim Family Laws Ordinance 1961, the Basic Democracy system was prevalent in the country. The local bodies system within Pakistan has been changed more than one time and Basic Democracy system has been abolished. This abolition brought great setback for the implementation of MFLO. Therefore it is recommended that necessary amendment should be introduced in MFLO 1961 through legislation for the effective implementation.
9. Jurisdictions of the Union Council should be notified after revision of constituencies to ensure facilitate general public and cope with the problem of increase in population.
10. There is dire need to implement an effective system for the registration and record keeping of Muslim marriages. It is necessary that all functionaries of the Union administration be adequately trained to correctly and diligently register marriages and perform ancillary duties of record keeping. These processes should be transparent and the

procedure should be such that it makes interpolation or changing of entries impossible.

11. Column 5 of the *Nikāhnama* should be amended with addition of following:

If the bride is divorced or widow, how many children she begets from her previous husband?

12. In column 21 of *Nikāhnama*, the following sub column should be added:

Whether the bridegroom is divorcee or widower, if yes, then how many children he begets from his previous marriages?

13. It is recommended that expertise of National Database and Registration Authority, Government of Pakistan, should be utilized in the registration process of Marriages and Divorce. The wedding couple should be issued cards as proof of their marriage, with all necessary information, for quick and easy reference (the sample card which is issued in Malaysia, is attached as Annex- D).

14. Proper mechanism should be devised for the registration of *Talāq* and specially trained professionals should be appointed for the said purpose. It is also recommended that Divorce Registration Certificate should be introduced. The researcher agrees with sample of the certificate suggested by the Council of Islamic Ideology Vide its annual report 2008-2009, p. 46, (Attached as Annex- E).

15. Inclusion of religious scholar should be made compulsory in the Arbitration Council in addition to prefer the nominees of both parties being their close relatives.

16. The discrimination between revocable and irrevocable divorce should be included in section 7.

17. Necessary legislation should be made for the divorce before valid retirement or pre-consummation as there no need of waiting for period of *iddah* under the teaching of *Shariah*. In the current situation, a woman has to wait for 90 days for effecting the divorce which is not justified nor sympathetic for women.

18. Pronouncement of divorce without intimation to the Chairman Union Council should be regarded as effective however, suitable penal punishment should be legislated for the violators.

19. A law should be introduced making it obligatory for the husband to comply with his Islamic obligations and liabilities of paying dower, maintenance, return of dowry and custody of minors, and to satisfy the court on all these counts before declaring the divorce valid.

20. A person who pronounces divorces through no fault of the wife should be required to pay compensation to the wife.

21. There is lack of distinction between *khul'a, fasakh* and dissolution of marriage on the grounds identified in dissolution of Muslim Marriages Act, 1939. Since

the term *khul'a*, its grounds and conditions are not defined in the law, hence it is generally considered on the grounds provided under section 2 of the Dissolution of Muslim Marriages Act, 1939. Therefore, it is recommended that each term should be included in the Act under clear and obvious definition in order to provide maximum relief to women folk.

22. Mostly women are forced to ask for *khul'a* by the husband and in-laws so that she may give up all her due rights. This situation is against the clear injunctions of Islam as lack of provision to investigate into the cause of *khul'a* though there is no Legal bar. Therefore, it is recommended that there should be a proper mechanism to check the justification of *khul'a* for providing relief to women under duress.

23. The provision of impotency of husband is limited to the impotency at the time of marriage, and it does not take into consideration impotency which may occur subsequently. Therefore, it is recommended that subsequent occurrence of impotency of husband after the marriage should be included in the Act through necessary amendment.

24. It is further recommended that the Court should use the term of *fasakh* instead of *khul'a* in the cases where the Court orders separation between the married couple in order to distinct between the both terms under the *Shariah*.

25. There is no legal provision explicitly defining or giving details in about maintenance. Hence, a divorced woman's right to maintenance is subject to interpretation by Court of Law. Therefore, it is recommended that clear and explicit clauses should be incorporated in the section 9 of the Muslim Family

Laws Ordinance 1961 to provide easy understanding of the subject and quick relief to the effected women.

26. It is an irrefutable fact that very often suits for maintenance (and other family suits also) takes years to get the issue decided by a Court of law and the woman remains a victim to innumerable glooms. In the special circumstances of our country where woman are generally not able to earn their livelihood, a wife's right of demanding dissolution of marriage conditioned with two years neglect or refusal in providing maintenance to her, requires sympathetic consideration. The wife should be provided a right to present a petition in a Family Court demanding parting in the event of husband's failure or overlooking without a just reason, prescribing a time-limit of six months. If the Court after consideration of the husband default for non-providing maintenance as well as his monetary conditions, comes to the conclusion that there are no suitable reasons for non-providing maintenance by the husband and he is also not poverty-stricken, it should, without delay, order for separation. If the husband is unable to provide maintenance to his wife due to his poverty and there be sufficient reason to believe that there is no possibility in the near future for his earring sufficiently so as to provide maintenance to wife, the Court should, without delay, order separation, especially when there is an apprehension of wife going astray form the path of virtue due to husband's poverty. However, if there is a possibility for husband's earning enough to maintain his wife, he should be allowed proper time. If he does not prove his earnings, capability and eagerness to provide

maintenance to his wife within the time allowed by Court, an order for separation should be passed by the Court.

27. Islamic law confers upon the wife the right of filing a complaint in Court if the husband neglects or defaults continuously in providing maintenance to his wife. The Court thereupon shall pass an order against the husband for payment of maintenance operating cost. If the husband, in spite of the order passed, fails to pay the maintenance amount; the Court is empowered to pass an order for the husband's imprisonment for a fixed period. Some of the jurists have agreed one month's imprisonment on account of non-payment of maintenance expenses and some others have specified the period of imprisonment to be three months. To this writer, one month's imprisonment is preferable. And if the husband, during detention, pays the maintenance allowance to his wife, he shall be set free, simultaneously.

28. In Pakistan's Family Laws, there is lack of legal provision on 'divorced women's right to maintenance. There is no provision for the entitlement of divorced women to maintenance during *iddat* or even past maintenance. Therefore, necessary legislation on the subject is recommended.

29. Lack of security mechanism for the protection of women from violence after divorce is direly felt as it has been observed that at times violence against divorced women by the former husband goes to such an extent that the people providing support to them also becomes victim of violence. Therefore, legal

provision should be developed to provide security of effected women and the people providing support to them.

30. Another serious problem is lack of legal provision for divorced women right to seek maintenance of her children. Since mother is not considered natural guardian, hence, there is no presumed right of her to seek maintenance for her children unless appointed by the court as guardian of children. It is recommended, therefore, to legislate on the subject problem to provide the divorced woman, maintenance for her children, also.

31. It is a fact that, in Pakistan, there is lack of mechanism for the enforcement of right to maintenance outside courts. In the absence of such mechanism, for every single case an aggrieved woman has to approach the court which is not feasible in the prevailing socio cultural and economic set up. Therefore, it is recommended necessary steps for ensuring the maintenance without approaching the Court should be taken through educating the general public and incorporation of the subject in the text books of suitable level.

32. It is further suggested to legalize necessary legislations by the legislature to curb the menace of runaway and secret marriages which sometimes results in the crime of honor killing. The incidents of honor killing in love and runaway marriages through eloping of girls with their friends also indicate that our social and moral norms are against them and they are not tolerated in some regions. Therefore, the

option should be used in the situations where interests of the marrying parties are in danger.

33. In Pakistan, the "Guardian and Wards Act, 1925" is in force. But this law does not fulfill the social needs of a Muslim society growing in various dimensions. The deficiency to a certain extent has been made up by the decisions of our courts, but it seems opportune to mention here that in the light of the courts' decisions and with the help of the law relating to *hiḍanah* current in other Muslim countries, entirely fresh legislation shall help in the removal of the most of the confusion prevailing in the present day Muslim social life caused by legislation not based on Islamic principles. The principle, "The basis of *hiḍanah* is the child's welfare" and the rule, "Woman's marriage contact with a stranger makes the right of custodianship lapse" both, in the circumstances of each case, are true by themselves, but they have obviously to be applied with reference to the special circumstances of each case.

34. Suitable amendment should be made in the Guardian and Wards Act, 1890 to provide:

a. that the court shall have power, irrespective of whether any proceedings for the custody or guardianship of a minor are pending before it or not, to direct the person having the custody of the minor to allow the father or mother or other near relative to see the minor after reasonable intervals.

b. In case of the custody of minor the father of the minor shall not be allowed custody if it is proved that he had failed to provide maintenance to the minor for a period of two years or more without a reasonable cause.

35. As the majority of Pakistani Muslims follow *Hanafi* juristic school which determines the minimum limit for dower as 10 dirhams, therefore, it is suggested that Ministry of Finance and State Bank of Pakistan should announce the equal amount of 10 dirhams in each fiscal years in order to facilitate the general public and honorable Courts in determination of minimum limit of the dower in marriages. It is pertinent to mention that the ministry of finance announces the limit of minimum amount required for the deduction of *zakat* each year in addition to the amount of blood money (دیت) also.

36. It should be enacted, If no details about the mode of payment of dower are given in the nikahnama, the entire dower shall be presumed by the court to be payable on demand.

37. The Holy Qur'an is very explicit on the payment of half dower in case of the non-consummation of marriage. Various opinions of scholars and judgments further provide for the payment of dower even in the case of valid retirement (*khilwat-e-sahiha* ولختبحیحص), but the current law is silent on the issue. Therefore, either women remain silent on their rights or they spend years in litigation to get their due rights. Therefore, it is recommended that all kinds of dower should be explicitly explained in the legislation enabling easy and smooth settling of concerned disputes.

38. Though the existing law (section 10 of MFLO 1961) under which if the mode for payment of dower is not mentioned, the entire dower is presumed to be payable on demand but it still needs more clarification to empower women to enforce their rights.

39. If no details about the mode of payment of dower or *mahr* are given in the *nikahnama*, the entire dower or *mahr* shall be presumed by the court to be payable on demand.

40. Keeping in view the customary practice of dowry in Pakistan, it is recommended that fixed limit for the dowry, bridal gifts and presents should be reviewed as it was determined almost 38 years before. The limitation of rupees five thousand on the aggregate amount of dowry is unrealistic for people belonging to multiple strata of the society. Therefore, Dowry and Bridal Gifts (Restriction) Act, 1976 should be revised on realistic lines keeping in view the rising inflation.

41. It is further recommended that the limit of the dowry and bridal gifts should be reviewed after suitable intervals by the finance ministry to ensure maximum relief to the effected families.

42. Though under the law dowry exceeding rupees five thousand is illegal even the customarily expensive dowries are given (without any documentation), mostly on demand of the bridegroom and his family. Thus upon dissolution of marriage, it is practically difficult to have her dowry back from the husband and his family

members. Even otherwise in the absence of any documentary evidence recovery of the dowry articles is quite difficult.

43. The Dowry Prohibition Act 1961 made an outright declaration that 'demanding, giving and taking' of dowry would all be punishable offences but the social evil of dowry is rampant throughout the country. Therefore, it is recommended that the concerned law should be implemented in letter and spirits.

44. The list of all prohibited relations should be published after necessary legislation in order to provide easy access for all concerned ones same like the Malaysia's Act 303 provides the list of prohibited women for marrying.

Annexure "A"

Questionnaire of Marriage and Divorce Commission, 1955

NIKAH

Question No. 1. Should Nikah be performed by state appointed Nikah Khwans only?

Question No. 2. Should there be compulsory registration of marriages, and if so, what machinery should be provided therefore? What should be the penalty, if any, and who is to be penalized for non-registration?

Question No. 3. What machinery should be provided to ensure that the marrying parties have freely consented to marry each other, and that neither of them has been a victim of undue influence?

Question No. 4. Would you prevent child marriages by legislating that no man under eighteen and no woman under sixteen shall enter into a contract of marriage?

Question No. 5. Is the fixation of these age limits prohibited by Holy Quran or any authoritative Hadith?

Question No. 6. Do you agree that any condition may be inserted in the marriage contract which is not repugnant to the basic principles of Islam and morality, and that all such conditions shall be enforceable in a law-court?

Question No. 7. Do you agree that it should be enacted that it would be lawful to provide in the marriage contract that the woman will have the right to pronounce divorce in the same manner as the man?

Question No. 8. What steps should be taken to prevent the sale of daughters in certain cases, and the receipt of money by the partners or guardians?

Question No. 9. Should a standard Nikah Nama be prescribed and its execution made compulsory at the time of the solemnization of the Nikah?

a. **Divorce by the Husband**

Question No. 1. If a husband pronounces Talaq three times in a single sitting, should it be recognized as valid and final divorce or should three pronouncements during three Tuhurs as enjoined by the Holy Quran, be made obligatory?

Question No. 2. Should there be compulsory registration of divorces?

Question No. 3. What should be the penalty for non-registration?

Question No. 4. Should conciliation committee be appointed for different areas and no divorce be recognized as valid till the parties have applied to the conciliation committee which should co-opt one member of the husband's family and one member of the wife's family?

Question No. 5. Should it be open to a Matrimonial and Family Laws Court, when approached, to lay down that a husband shall pay maintenance to the divorced wife for life or till her remarriage?

b. **Divorce Sought by the Wife**

Question No. 1. Do you regard the provisions of the Dissolution of Muslim Marriages Act,1939, satisfactory or would you enlarge or amend them in any particular?

Question No. 2. Would you embody the Khula form of Talaq in a legislative enactment to make it more certain in practice?

c. **Polygamy**

Question No. 1. The Quranic verse dealing with polygamy occurs only in connection with the protection of the rights of orphans. (Verse III, surah Al-Nisa). Is polygamy prohibited except when the protection of the rights of the orphans is the main objective?

Question No. 2. Should it be made obligatory on a person who intends to marry a second wife in the life-time of the first to obtain an order to that effect from a court of law?

Question No. 3. Should it be laid down that no court can grant such an order till it is satisfied that the applicant can support both wives and his children in the standard of living to which he and his family have been accustomed?

Question No. 4 Should it be laid down that the court shall make provision at least one-half of the salary of such an individual is paid directly to the first wife and her children?

Question No. 5. In the case of persons who do not enjoy a direct salary, should the court demand guarantees from the applicant for the payment of at least half his income to her first wife and her children?

d. **Mehr**

Question No. 1. Should it be enacted that the Mehr fixed in the marriage-contract shall be payable however high it may be?

Question No. 2. Do you approve that there should be no period of limitation in a

suit for Mehr ?

Question No. 3. Are you of the opinion that if there is no specification in the Nikah-Nama concerning the time of payment of Mehr then half of it should be regarded as Mu'ajjal (payable on demand) and the other half as Mawajjal (deffered) payable on the dissolution of marriage either by death of the husband or by divorce?

e. **Custody**

Question: At present the mother is entitled to the custody of the person of her minor child only up to a certain age i.e. the male child up to seven years and the female child till she attains puberty. These limits have no authority either in the Holy Quran or Hadith, but have been fixed as the opinions of some Muslim Jurists. Do you consider it admissible to propose some modifications?

Maintenance of Wife and Children

Question No. 1. Are you in favour of enacting that if the husband neglects or refuses to maintain his wife without any lawful cause, the wife shall be entitled to sue him for maintenance in special Matrimonial and Family Laws Court?

Question No. 2. Under section four hundred and eighty eight of the present Code of Criminal Procedure, the wife can apply to a Criminal Court for maintenance. The Criminal Court can pass an order for maintenance not exceeding a monthly allowance of one hundred rupees. Are you in favour of increasing the limit permissible under the Criminal Law?

Question No. 3. Would you be in favour of the proposal that a wife should be allowed to claim past maintenance not exceeding three years?

Question No. 4. Do you consider that if there is a stipulation in the Nikah-Nama that the wife shall be entitled to claim maintenance for the stipulated period and not only for the period of Iddat?

f. **Guardianship of Property**

Question No.1. Do you agree that in the absence of the father the court should appoint the mother as guardian of the property of her children, unless such appointment is considered detrimental to the welfare of the minor and protection of the property?

Question No. 2. Would you legislate that the guardian of the property of the minor shall have no power to sell or mortgage the property of the minor without the previous permission by the court?

g. Inheritance and Wills

Question No. 1. Would you suggest that if there are any parts of Pakistan where the Shariat Laws of inheritance do not prevail, immediate steps be taken to enact such legislation?

Question No. 2. In the view of complexity of Procedural Laws, would you be in favour of the proposal that whenever a woman is a plaintiff in respect of her rights of inheritance the ordinary Civil Court shall transfer such suits to the Matrimonial and Family Laws Courts for expeditious disposal?

Question No. 3. Is there any sanction in the Holy Quran or any authoritative Hadith whereby the children of a pre-deceased son or daughter are excluded from inheriting property?

Question No. 4. Is it permissible to legislate that a Muslim may transfer property to anyone for life with the provision that thereafter the property shall revert to his own heirs?

Afterwards, the said question four was amended by the commission as:

Is it permissible to legislate that a childless Muslim may transfer property to his wife for life with provision that thereafter property shall revert to his own heirs?

Question No. 5. Do you consider that the Waqf ‘ Alal Aulad Act, 1913 , should be amended and improved to enable the property to be sold or exchanged or dealt with otherwise to improve its value or use by permission of the court?

h. Dissolution of Marriage by Court

Question No. 1. Should the grounds mentioned in section two of the Dissolution of Muslim marriages Act be enlarged, restricted or amended in any manner?

Question No. 2. Should it be enacted that if a woman wants dissolution of marriage and in the opinion of the Court the fault lies with the husband, the divorce may be allowed without requiring the wife to part with Mehr or anything else which she may have received from the husband?

Question No. 3. Would you make incompatibility of temperament a valid ground for divorce?

Question No. 4. Should the period of seven years' imprisonment mentioned in clause three of section two of the dissolution of Muslim Marriages Act [that the whereabouts of the husband have not been known for a period of four years] be reduced to four years?

i. Matrimonial and Family Laws Courts

Question No. 1. Are you in favour of this suggestion that in each divisional headquarter, a judge equal to District & Session Judge be appointed in special Courts meant for Matrimonial and Family suites only?

Question No. 2. Are you in favour of the suggestion that such cases which are related to Matrimonial and Family matters and where the plaintiff is woman be sued in these Courts?

Question No. 3. Are you in favour of the suggestion that procedures of such Courts should be separate from the present Civil and Criminal Courts, and this Court should settle the case within three months?

Question No. 4. Are you in favour of the suggestion that there should be no court fees or other judicial expenses?

Question No. 5. Are you favour this, there should be no restriction on following the case personally in these Courts, even the relatives or representatives may be allowed to pursue the case, and there should be no restriction on the lawyer to be a license holder?

Question No. 6. Do you favour this suggestion that one male and one female counsel should accompany the Judge?

Question No. 7. Do you favour that these Courts should hold their meeting in different districts turn by turn?

Question No. 8. Do you favour the suggestion that both parties should not be allowed to appeal against the decision of the Court more than once?

Question No. 9. Do you favour that the appeal should be made in the High Court directly and the decision of appeal should be made within three months?

Question No. 10. What do you suggest about the realization of amount and compliance of orders, decided by the Court?

Question No. 11. What do you suggest to meet the different kinds of expenses in such cases of these Courts?

The dead line for the receipt of these questionnaires was fixed as January 15, 1956 which was extended to February 15, 1956, later on. In the light of responses of the public, the commission announced the report on June 20, 1956 but the Government did not enact its recommendations, immediately.

FORM I

(See Rule 7)

[Licence granted in pursuance of section 5(2) of the Muslim Family Laws Ordinance (VIII of 1961)]

In pursuance of sub-section (2) of section 5 of the Muslim Family Laws Ordinance 1961 (VIII of 1961) the Union Council , Union Committee, Town Committee of …………… in the district of …………………… hereby grants this ………………day of …...19……. to Mr. ……………………………….. son of …………………. resident of.………….. …………... this licence, subject to the conditions hereunder specified, to be from the said date the Nikah Registrar for the following wards:

1) ……………………………………………………
2) ……………………………………………………
3) …………………………………………………..
4) ……………………………………………………

Seal *Signature of the Chairman*

CONDITIONS

1. This license is not transferable
2. This license is revocable for breach of any of the provisions of the Muslim Family Laws Ordinance 1961 (VIII of 1961) or the rules made there under or any condition of this license.
3. The registers and seal supplied to the Nikah Registrar shall be returnable to the Union Council/Union Committee/Town Committee without refund of cost, when this license expires or is revoked.
4. The Nikah Registrar shall not put the seal supplied to him to any improper use.
5. Such conditions, if any as may be specified by the Provincial Government.

List of Qura'nic Verses

List of Ahadīth:

List of Persons' Names

List of Places